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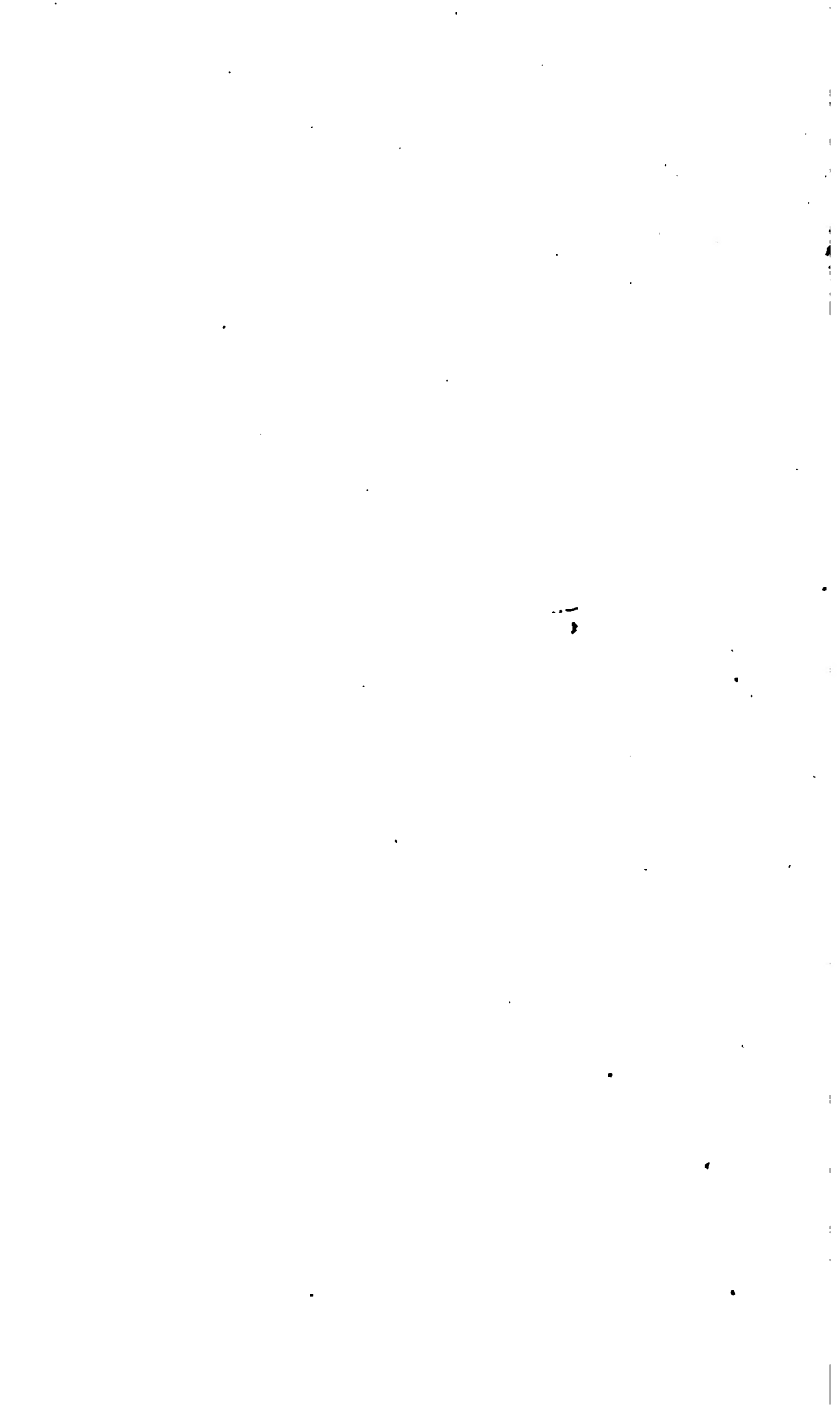
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A
TREATISE
ON
ADMIRALTY AND PRIZE:

TOGETHER WITH
SOME SUGGESTIONS FOR THE GUIDE AND GOVERNMENT
OF UNITED STATES NAVAL COMMANDERS IN
MARITIME WARS.

BY
DAVID ROBERTS.

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PREFACE.

THE present work is about to be committed to the profession and public, with the hope that it may accomplish the Author's design and plan, and become a useful and readable Law Book.

If it have the effect upon any student, ambitious to excel in his profession, to stimulate to labor and incite him to the requisite study, it will be some compensation.

If it find moderate favor on its mission, that will furnish encouragement to future improvement; and to this end, the Author announces that any seasonable suggestions from the kindly disposed, or candid criticisms of the profession, will be cordially welcomed.

"TO HON. CHARLES G. LORING¹

This volume is, with his consent, respectfully dedicated, as some slight token of my appreciation of his honorable career as a conspicuous member of a Bar, heretofore as now, distinguished for the eminent ability of its members.

"In so doing I recall, but with a melancholy pleasure, the kind, just, generous, and magnanimous tribute of respect and affection (which was by Mr. Loring addressed to the Suffolk Bar, July 19, 1859,) for an early friend and correspondent, the late Rufus Choate, that greatest of advocates and most amiable of men, from whose approval of my plan, I probably received more encouragement in this undertaking than from any and all other sources.

DAVID ROBERTS."

1864.

¹ The Dedication, as prepared in 1864, will be retained, and is now given in *memoriam*. May 25, 1869. D. R.

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PART I.



ADMIRALTY JURISPRUDENCE.

ADMIRALTY JURISPRUDENCE.

CHAPTER I.

THE sources from which an accurate knowledge of Admiralty Law may be derived, are many and various. In theory, the United States may seem to have borrowed it directly from England ; yet, in practice, reference to other countries and codes is indispensable to consummate that knowledge.

No jurist can satisfy his own mind as to the nature of Admiralty Jurisprudence, or extent of Admiralty Jurisdiction, by a simple recurrence to the legislation or adjudged cases of England alone ; and no treatise upon this subject would be either complete or comprehensive which did not also largely draw from what are, in Europe, denominated the Foreign or Marine Ordinances. By this expression are meant certain maritime codes, which, at different periods in the growth and history of commerce, have become incorporated into the Marine Jurisprudence of Europe.

The Maritime Ordinances or Codes originated in the Middle Ages, and not with the so-called great powers of modern Europe ; nor is their origin, to any great extent, to be traced back to ancient Greece or Rome, save only such portions thereof as may have survived the wreck of time, and come down to modern times,

though but in fragmentary form, under the name of the Rhodian Law.

But the ancient sea-laws or maritime codes usually referred to and relied upon as authority, are chiefly known as —

1. The Laws of Wisbuy;
2. The Laws of Oleron;
3. The Laws of the Hanse Towns; and
4. The Ordinance of Louis XIV.

Others, indeed, are occasionally referred to, such as that of Philip II., of Spain, and the *Consolato del Mare*, embodying the usages and regulations of trade, particularly as applicable to the Mediterranean Sea, in the Middle Ages; but they embody no novel or valuable principles of maritime jurisprudence, which are not also to be found, and as well, or better expressed in either the codes of Wisbuy, Oleron, the Hanse Towns, or the Ordinance of Louis XIV.

Therefore, in the preparation of this work, while seeking great principles, and in the absence of reported decisions, our references will be made mainly to the four compilations known and designated as the Foreign Ordinances; and occasionally, perhaps, to some elementary works of European jurists, and English and American writers and magistrates.

Many works have been published upon the subject of international law and rights and dominion over seas. A limited enumeration of such as treat of nautical or naval rights shall be incorporated here for the general convenience of the student; it might easily have been enlarged and made more minute.

John Selden was an Englishman, who published, in 1635, his work entitled *Mare Clausum*. This was, doubt-

less, written by its author in reply to the *Mare Liberum*, a treatise written and published by Hugo Grotius, some ten years before. From this cause, these two great minds were afterward placed by their contemporaries in a *quasi* condition of rivalry, while their respective works have continued to benefit and instruct posterity, and gladden the heart and excite the emulation of the zealous student of jurisprudence, both in Europe and America.

Another Englishman, Professor Richard Zouch, wrote *De Jure Nautico*, and published it in 1650, when he was about sixty years of age. He was a distinguished civilian, Regius Professor of Laws at Oxford, Warden of the Cinque Ports, and Judge of Admiralty. This work is highly valuable, and has been frequently referred to by eminent judges, and particularly so by Mr. Justice Story. Richard Zouch was born in 1590 and died in 1660. His works on maritime jurisprudence were written in Latin.

About the same period, 1651, was published *De Jure Maritimo et Navali*, a work written by Johannes Loccenius, a professor of Sweden.

And another treatise under the same title, written by Charles Molloy, an Irishman, first appeared in 1666.

In 1702, Cornelius Van Bynkershoek, of Zealand, put forth his work entitled *De Dominio Maris*.

In 1760 was published *Commentaire sur l'Ordonnance de la Marine*, a work written by that eminent European scholar and jurist, René Josué Valin; and 1763, *Tracté de Prises*, by the same author, — this latter having been published only two years before his death.

Joseph Laurentius Maria de Casaregis was born in 1670 and died in 1737. During his life, he gave to the

world the *Discursus Legales de Commercio* ; a second edition was published after his decease, in 1740.

The work *Droit Maritime de l'Europe* was written by Dominico Alberte Azuni ; and it is a work to which frequent reference has been made in maritime cases. Its author was, by birth, a Sardinian ; born in 1760, and died in the year 1827.

In 1803, Thomas Hartwell Home published a Compend of Admiralty Decisions. A Digest, by William T. Pritchard, was published in 1847 and 1848. This has been enlarged by its author, assisted by Dr. Pritchard, and a new edition published in 1866. In its present form, it is a most valuable and convenient work on admiralty.

Wicquefort's *La Ambassadeur et ses Fonctions*, as well as Miltiz's *Manuel des Consuls*, are useful for examination, in considering the subject of maritime jurisprudence.

In this brief review of works on maritime law, that of J. M. Pardessus, entitled *Us et Coutumes de la Mer*, ought most assuredly to be mentioned.

But, not to be too minute in this reference to the sources of instruction for the student of marine law, it may not be inappropriate to recall likewise the names of other jurists and magistrates, who, both in England and the United States, are often referred to with respect in admiralty causes, alike on the instance and prize sides of admiralty courts.

Since the time when Sir James Marriott presided over the High Court of Admiralty in England, his successors in that office have been conspicuous for their learned labors, judicial capacity, singular experience, and consummate mastery of admiralty law. Sir Wil-

liam Scott (perhaps better known by his later title, Lord Stowell) was the immediate successor of Sir James Marriott. Lord Stowell was, perhaps, as free from national vanity and prejudice as it is possible to suppose an Englishman to be; and the decisions of this great magistrate, as reported by Christopher Robinson, Edwards, Dodson, and Haggard, will ever remain a monument and recorded evidence of his extensive legal learning, varied classical culture, and sound, and generally correct judgment in judicial proceedings.

From 1799 to 1867, the High Court of Admiralty in England was presided over by only four admiralty judges — Stowell, Robinson, Nicholl, and Lushington; all admirably qualified for that station by previous training as King's advocates, or fitting experience in the practice and proceedings of that court. The first and last each occupying the position twenty-nine years; the second and third respectively four and five years each. Lord Stowell held the place from 1799 to 1828, when he was succeeded by Sir Christopher Robinson, who pronounced his first decree in March following, and administered the duties of the station from 1828 until 1833. He was succeeded by Sir John Nicholl, who filled the office from 1833 until 1838, when he was succeeded by Sir Stephen Lushington, who resigned in 1867; when the place was filled by the appointment of Sir Robert J. Phillimore, the present incumbent.

How much Lord Stowell contributed to establish a consistent practice in prize proceedings may be gathered from the cases reported in the earlier volumes of the regular series of English Admiralty Reports. But it is no exaggeration to state, that the chief merit of the present improved practice and enlarged jurisdiction of

the English High Court of Admiralty is essentially attributable to Dr. Stephen Lushington.

The present judge (Sir R. J. Phillimore) has not been sufficiently long in office to enable those at a distance to pronounce upon his judicial merits. He has merits as a writer on public law and practitioner in the civil law. With antecedents favorable, promising ability, and conceded experience, it may well be hoped that, when the future reports of Browning and Lushington or others appear in print, the cases containing decisions of the present judge will compare not unfavorably with those of his predecessors.

During this succession of English judges in admiralty, either by adjudications or legislation, the admiralty law has been moulded into its present shape; and, so far as the law or practice has been ameliorated or improved, the merit thereof is mainly due to the assiduity and labors of Dr. Lushington.

And now, the admiralty law and practice of England differs but little from that of the United States, in regard to the class of causes of which admiralty has usually taken cognizance; save only, that, in this country, locality has totally ceased to be a test of jurisdiction, in hearings before the United States Supreme, Circuit, and District Courts; and it does not now appear that, in England, such jurisdiction was ever claimed, or cognizance taken in the High Court of Admiralty over policies of insurance, as has been claimed and taken in the Circuit and District Courts of the United States First Circuit, since 1815. The question, however, as there raised, has never been solemnly decided by all the judges of the United States Supreme Court; and, having occasioned a great variety of opinions certainly, if not

a conflict of decisions, it still remains an open question and ought, in some way, to be permanently settled.

With these exceptions as to tests of jurisdiction, both the course of proceeding in admiralty and the subjects embraced within its jurisdiction in England and the United States, are very nearly, if not quite, identical. Admiralty jurisprudence, like the law of insurance, is measurably of modern growth. In England, Lord Stowell judicially led off; and, in this country, Mr. Justice Story; and both contributed materially to define, settle, and establish the practice and jurisdiction of admiralty courts, as now understood and recognized in the two countries.

In the United States, the first, second, third, fourth, fifth, and sixth circuits include those harbors and ports of entry, where the people are most absorbed in commercial pursuits; and in which, accordingly, cases of admiralty and maritime jurisdiction were most likely to occur.

In these circuits are severally located the commercial cities of Boston, New York, Philadelphia, Baltimore, Charleston, Mobile, Savannah, and New Orleans; and there have usually arisen the leading cases on the subject of admiralty in general, as well as those, in particular, in which questions of jurisdiction have been, in the first instance, started, and which were afterwards heard and decided in the Supreme Court,—some one of the several district courts of the six enumerated circuits having originally assumed or declined to exercise jurisdiction.

The reports of cases in admiralty, in this country, will be found arranged in a tabular statement contained in Appendix marked (A); also the names of all the per-

sons appointed or nominated to be judges of the United States Supreme Court, and other principal law officials from the year 1789 to the present date ; together with a connected series of British Admiralty Reports, at least from 1799.

It has already been observed, that those nations of Europe, known, in modern times, as the Great Powers, did not originate the maritime codes, known as the Foreign Ordinances ; nor have these states, though wielding great political sway, until the present century, contributed materially to enlarge, improve, or qualify the leading ideas and general principles of maritime jurisprudence, which are so tersely expressed and lastingly embodied in the insular productions of Rhodes in the Archipelago, Gothland in the Baltic, Oleron in the Bay of Biscay, and the Hanseatic code of the free cities or republics near and adjacent to the Baltic Sea.

With a slight exception, the original of the Foreign Ordinances may be justly termed insular productions. And it is, indeed, somewhat remarkable that the people of these small islands (Rhodes, Gothland, and Oleron) should have enabled themselves, by reason of their commercial enterprise and experience, to thus become, not only framers of codes, but the actual teachers and expositors of maritime law for all the rest of the European world.

To our regret, fragments only of the Rhodian law have reached us ; those fragments having been preserved by being incorporated in the chapter of Justinian, entitled *De Jactu*, and what is thus preserved constituted but a small portion of the whole of the original code of Rhodes.

The Laws of Wisbuy were compiled about the year

1288, on the island of Gothland in the Baltic Sea, and they contain some seventy articles; as will be found by referring to such as have been published in Peters' Admiralty Reports. The author of this body of laws is unknown.

The Laws of Oleron first appeared about the year 1338, and contain some forty-seven articles. They are so called from the island where they were originally compiled,—Oleron being a small island on the west coast of France. It has been a point of animated debate among French and English jurists, whether these laws were compiled under the direction of Eleanor, Duchesse of Guienne, or her son, Richard I., of England. But neither party have conclusively established their several claims of authorship. However this may be, and however fit and tempting the topic may be to the curiosity of the antiquarian, it seems not to be particularly pertinent to the present undertaking.

The Laws of the Hanse Towns were the production of what was denominated the Confederation of Free Cities, in Northern Germany. There were three principal cities or republics (Lubec, Hamburg, and Bremen) in the confederacy originally; but, at one time, as many as eighty different cities had joined the League, and agreed to be governed by its commercial code. The Hanseatic code first appeared in the year 1597, and contained about sixty articles.

Subsequent to the publishing of the laws just enumerated, there was compiled a work in France, denominated the Ordinance of Louis XIV., published in the year 1681, divided into parts, and those parts subdivided into articles; making, altogether, about two hundred and fifty articles. This was accomplished during the ad-

ministration of Colbert, the eminent minister of France, in the time of Louis XIV. It is an authentic, standard, reliable, and valuable compilation ; and unquestionably embodies no inconsiderable portion of the prior codes. Besides, it is fuller than they are ; more minute, and embraces additional subjects. Much of the merit of the plan is justly ascribable to the minister Colbert himself, though the chief value of its execution is doubtless due to the minister's commissioners. Who the commissioners that executed the work were, may remain, hereafter as heretofore, entirely unknown. There is every probability that the work was performed by some jurist appointed by Colbert, but whose name was, at the time, undisclosed ; and, at the present time of writing, remains undiscovered by writers on law.

In the seventh edition of Kent's Commentaries, vol. iii, p. 15, is this paragraph : "It is, however, an extraordinary fact, that the able civilians, and perhaps the distinguished merchants, who assumed the task of legislators, and compiled this ordinance, are unknown to fame ; and though the event be of so recent a date, and occurred at the most polished and literary era in French history, yet neither letters, nor gratitude, nor national vanity have been able to rescue their names from oblivion." ¹

¹ Since preparing the text, in examining the History of France, written by Henri Martin, vol. i., p. 494, age of Louis XIV., I have met with the following passage, and shall give it entire, as translated by Miss Booth.

"The minister who had created the French marine, crowned his monument by an admirable work.

"Colbert, embracing by a glance all social relations, had well understood what influence a good administration of justice had upon the progress of public wealth. We have already described the essential part that he had taken in the civil and criminal ordinances of 1667 and 1669 ; then, how he had regulated the relations and disputes of general commerce by the ordi-

This survey of the sources whence a precise and comprehensive knowledge of marine jurisprudence may be acquired, seems to have been a useful as well as necessary introduction to the present treatise.

nance of commerce in 1673. The wholly special interests and habits of ocean commerce demanded a separate constitution ; the customs of the Middle Ages, the ordinances of the 16th century, no longer sufficed the new marine.

" For ten years Colbert had been laboring on a maritime code, *through a commission*, the most *active members* of which were the *Master of Requests*, *Lebeyer de Boutigni*, and *Lambert d'Herbigni*. The ordinance concerning the marine appeared in August, 1681.

" This ordinance descends through every grade of hierarchy, from the admiral to the carpenter and caulker, and dictates the duties of each."

CHAPTER II.

MEANING OF "ADMIRALTY AND MARITIME JURISDICTION" IN THE UNITED STATES.

THE Constitution of the United States (Article I, section 3) provides, that the judicial power shall extend to "all cases of admiralty and maritime jurisdiction."

The general Judiciary Act passed September 24th, 1789, enacts, that the district courts of the United States "shall have original, exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction."

In civil causes, therefore, the grant of jurisdiction, under the Constitution and by the Judiciary Act of 1789, is substantially identical, in terms, certainly, and possibly also in meaning and extent.

Knowing then the significance and meaning of the terms, it would seem that the student of admiralty law ought not to encounter any great difficulty in ascertaining, with precision, the nature, limit, and extent of admiralty jurisdiction, as thus and thereby conferred upon the United States district courts, under their present organization.

Nevertheless, various theories, opinions, and decisions by learned jurists and distinguished magistrates have been entertained; and are still adhered to, which have occasioned much embarrassment, if not conflict in practice; thereby preventing a conclusive settlement of

some principles of law, which ought permanently and uniformly to govern and regulate both the rules of procedure and extent of admiralty jurisdiction of the district courts in the several States.

This want of uniformity (which has probably arisen from the great number of judges who administer the admiralty law in so many different States) has ever been an occasion for regret: and many have lamented that cases of sufficient importance have not been carried to the Supreme Court, so as to demand a definitive determination, by that high tribunal, of certain questionable points of practice of long-standing. Ultimately these points, however postponed, must be solemnly settled by that court or by further congressional legislation.

A just interpretation of the terms "admiralty and maritime jurisdiction" involves an inquiry, which is necessarily historical, critical and practical. If these qualifying terms "admiralty and maritime" are really synonymous, when used as prefixes to designate one kind of jurisdiction in admiralty proceedings, then the whole discussion may be narrowed down to simply giving an accurate definition of those words; and so need not be extended beyond such definition. The very definition itself will have accomplished the work of philology and criticism; and precludes all necessity of further historical illustration or practical reference to precedents; so that the legitimate limit of admiralty jurisdiction will thus be made apparent to the judicial mind. Still, for want of such clear and precise definition, already have these terms, since 1789, been a subject of much seemingly needless discussion, misapplication, and misinterpretation.

Those who deem the terms synonyms, at once adopt the further corollary, that "admiralty" and "maritime," as used in the Constitution and General Judiciary Act of 1789, are indeed convertible terms; that admiralty courts are *ex vi termini* maritime courts, that maritime jurisdiction is necessarily admiralty jurisdiction; and *vice versa*.

But, since, in written opinions and legal decisions, this has neither been readily assented to nor universally accepted as the true exposition of these terms, some practical aid may be afforded to the student and general reader, by a succinct survey and glance at the history and modes of procedure of the admiralty and vice-admiralty courts of England, and in its various dependencies in North America and the East and West Indies; covering a period from the time of their original appearance and organization, down to the time of the American Revolution at least, if not quite down to the time of adopting the Constitution of the United States of America in 1789.

The long struggle in England between the common-law judges on the one side, and those civilians on the other, whose life and labors were confined to the admiralty courts (though that struggle extended over two centuries with not a little discourtesy and a great deal of acerbity), may possess considerable interest for the student of history; but it has entirely ceased to be useful in expounding the general principles, which underlie and should regulate the course of proceeding and adjudication in the courts of admiralty.

Suffice it to say, that selfishness on the one hand and jealousy on the other continued to keep alive and intensify the controversy much beyond the occasion for

it; and altogether after the real cause for it had been withdrawn by the direct interposition of Parliament.

While prohibitions, unchecked by the restraining acts of the 13th and 15th of Richard II. were issued by the common-law judges of Westminster, the conduct of these judges greatly annoyed those civilians who favored an unrestricted admiralty jurisdiction.

Formerly, the judges of the common-law courts were unsalaried officers; and, as their compensation depended upon the number of suits of which they judicially took cognizance, selfishness alone might account for occasional interference, by prohibition within the domain of the admiralty tribunals. And hence it was that the common-law lawyers, led off by the great Coke, in their persistent encroachments upon the admiralty, and in their equally unscrupulous attempts to extend the common-law jurisdiction, materially contributed not only to prolong, but to embitter the controversy between themselves and the civilians. Instead, therefore, of settling, all such efforts tended to unsettle the jurisdictional limits of admiralty; whatever was done to render the boundaries of the admiralty court certain, only had the effect to make them really more uncertain.

From the year 1272 to the year 1660, all attempted legislation by the English Parliament proved to be vain and nugatory; and the whole series of ordinances, articles, agreements, answers, and resolutions, complaints, remonstrances, and inquisitions, whether by expert seamen, high admirals, privy councils, judges, the administration of kings, lords or commons of England, were measurably futile and abortive; accomplishing temporarily but little and permanently less; settling nothing, unsettling everything; so that in a candid

review of all these various and multiform attempts, there seem to be, in the retrospect, only the "acts and ordinances of the Republican Government of England" in 1648, which are really worthy of being rescued from oblivion, as containing abiding views and solid principles of admiralty jurisprudence, which may be deemed by jurists to be intrinsically operative and valuable; yet, upon the Restoration in England, these even were summarily abrogated.

The ordinance of Hastings was a restraining act, framed in 1272, for the purpose of restricting "divers lords" and "their stewards or bailiffs" from holding "any plea, if it concerned merchants or mariners."

In 1376, the Queensborough Inquisition was taken by "eighteen expert seamen," before William Nevil, Admiral of the North; Philip Courteney, Admiral of the West; and the Lord Latimer, Warden of the Cinque Ports. This document contained twenty-seven articles, under three different heads, and related to —

I. Offenses against the king and kingdom.

II. Offenses against the public good of the kingdom; and

III. Offenses against the admiral, the navy, and discipline of the sea.

In 1575 it was alleged that there was an agreement between the judges of the King's Bench and the Court of Admiralty, "for the more quiet and certain execution of admiral jurisdiction." But this agreement was "not observed as it ought to be," as the Lord High Admiral complained. What are called the *articuli admiraltatis* drawn up by Dr. Dun, Judge of Admiralty, make this wrong manifest. By the seventh specification of these articles, there are enumerated "certain grievances"

whereof the officers "especially complain" and desire redress.

These are the seven articles so sharply criticized by Mr. Justice Story, in his opinion as given in the case of *De Lovio v. Boit*.¹

The agreement of 1575 was disavowed by Lord Coke; who, in the answer to it, prepared by himself, in behalf of the common-law judges, declares the agreement to be "against the laws and statutes of the realm," and for that reason "the judges of the King's Bench never assented thereto, as is pretended."

But in 1632, the resolutions of King James and his Council, "for settling the difference concerning prohibitions," were adopted. There were five of these resolutions in all; the object of the first four was to restrain the King's courts in awarding prohibitions against the admiralty in certain specified cases; while that of the fifth resolution was to provide, that if a party, for any such cause, be brought from prison by *habeas corpus*, he shall "be remanded." Now, although these resolutions were found in Coke's early Reports, yet they were entirely omitted in the later editions; disappearing, as Dr. Arthur Browne says, "seemingly *ex industria*." 2 Browne's Civ. and Adm. L., p. 79.

However this may be, the resolutions and the "acts and ordinances of the Republican Government in England" in 1648 (which may be found in Scobell's collection), seem to be the chief legislative provisions of permanent value, in defining the jurisdiction and course of proceeding in the English admiralty, until a quite recent date.

Forms of processes there were indeed; and orders and

¹ 2 Gall. 399.

decrees may be found in that ancient repository of clerical formularies, "Clarke's Praxis," which was translated and incorporated in Hall's "Admiralty Practice," published at Baltimore in 1809.

But, until the latter part of the eighteenth and first half of the nineteenth centuries, very little variation in admiralty practice took place in the realm of England or her colonies, the British dependencies in North America, and the East and West Indies. The admiralty courts of the colonies were theoretically under the supervision of the Home Government; the local magistrates, appointed to preside in them, were commissioned in England; the decisions of these tribunals were subject, indeed, to be reëxamined, on appeal, by the High Court of Admiralty in England; and, accordingly, though indispensable, these tribunals were, perhaps wisely, established in the colonies; and for a twofold purpose:

First. To supply the place of a local exchequer court in securing and collecting the revenue in the different colonies.

Second. To take general cognizance of all such civil and criminal matters as were usually embraced within the admiralty and maritime jurisdiction of Great Britain, or as should be conferred upon the colonial courts by special commission of the British government.

Ordinarily, in practice, all colonial magistrates were appointed by commissions, issuing from the Home Government, or that of the Mother Country, as it was called. These commissions conferred upon the appointees powers commonly exercised by the English judges of the High Court of Admiralty. In this manner, vice-admiralty courts in the colonies were constituted; and,

therefore, they existed as such tribunals, specially created by the law officers of the crown, for the time being.

So then, the British vice-admiralty courts, in every sense, were special tribunals of the British Government, created such by their special commissions, issued at home, but designed to operate exclusively in the colonies. Being so constituted, their jurisdiction was limited or enlarged, according to the nature and number of the powers enumerated in the various commissions, wherein or whereby the delegated judicial authority was thus conferred upon the several colonial governors or deputy governors in the colonial dependencies. These commissions were the ordained charters or warrants to guide and direct the governors, who could not transend the powers therein prescribed ; but in their judicial capacity, they were necessarily confined to the exercise of those powers only which were specially enumerated in their original commissions.

In practice, the jurisdiction, so conferred, and the courts so created, answered the purpose and accomplished the object contemplated by the Home Government of England, in regard to the colonies ; and very well subserved the views and policy of the existing political administration of the country.

But it would seem to be an unwarranted assumption to affirm with confidence, that these special commissions were conclusive evidence, at the time, of what was the admitted general admiralty and maritime jurisdiction of the High Court of Admiralty in England, or its practice. While, therefore, these commissions were unquestionably a chart for the direction of the colonial vice-admiralty judges, they could not affect, nor did they in any

way indicate the limits or extent of a general admiralty jurisdiction, as exercised by the High Court of Admiralty in England. For no other purpose, therefore, can they be referred to as authority than as rules, directions, and instructions for colonial officers.

In another connection I may have occasion to state fully why it might be well to deal diffidently with these documents, as evidence of general jurisdictional powers in admiralty, of which, in no just sense, can they be deemed either a true reflection or representation.

In the latter part of the last century, the publication of admiralty reports, in England, was regularly commenced. Prior to these publications, there was but little authentic record extant of the doings or decisions of admiralty courts in Great Britain. The papers and opinions of Sir Leoline Jenkins, a former judge of admiralty, and particularly what may be called his charge, are often referred to with respect; so also are the cases in the time of Lord Mansfield, of *Lindo v. Rodney* (2 Doug. 613); that of *Le Caux v. Eden* (3 Doug. 594); and *Menetone v. Gibbons* (6 T. R. 267 in 1789); likewise the reported cases of Sir George Hay and Sir James Marriott; and the formularies of Marriott have been esteemed both valuable and serviceable to civilians, who were principally engaged in practice at Doctors' Commons before the courts of admiralty. Marriott's Reports also may be consulted with profit. Since his time there has appeared an almost consecutive regular series of admiralty reports, from 1799 to 1865, containing the decisions of a succession of four experienced and learned admiralty judges, which have well illustrated the rules and principles of admiralty jurisprudence in England, as well as the chief changes in its growth, during that

period; its present state and condition; and nowhere, indeed, has there appeared to be claimed or even countenanced any diversity of opinion as to the meaning of the terms "admiralty" and "maritime" when employed to designate a peculiar kind of jurisdiction.¹

In fact, during the half century and more which has now elapsed since the accession of Lord Stowell, and throughout the administration of his immediate successors, Sir Christopher Robinson, Sir John Nicholl, and Dr. Stephen Lushington, no variance whatever in the definition of these terms is to be met with in the reports of admiralty cases, or even hinted at or indicated in any admiralty judicial proceedings in England, which have come under my observation.

It is well known, that special acts of Parliament have, during the present century, materially extended admiralty jurisdiction; and subjects, not heretofore recognized as within the cognizance of admiralty courts, are now expressly embraced within their jurisdiction.

Thus it will be perceived by referring to chapter 65, Vict. 3 and 4; chapters 78 and 104, Vict. 17 and 18; the Rules of the Privy Council of 1854, and those of Dr. Lushington of 1855; and finally the code of rules formally approved by the Queen in Council, November 29, 1859; together with the Admiralty Court Act of 1861, cited as chapter 10, Vict. 24, that English legislators have much modified, and finally moulded, English admiralty law into its present shape. Beside these, there are the Merchant's Shipping Act of 1862, cited as 25 and 26 Vict. chap. 63; and more particularly, the regulations for preventing collisions at sea, somewhat modified by the Order in Council of January 9, 1863, alike worthy

¹ *Vide* note at the end of this chapter.

of attention and examination. These rules of navigation, as well as those of the United States, adopted by Congress in 1864, will be found in Appendix (B).

Thus, therefore, the English Statute Law will be found mainly in the six acts now known and cited as 3 and 4 Vict. chap. 65; 6 and 7 Vict. chap. 38; 17 and 18 Vict. chap. 78 and 104; 22 and 23 Vict. chap. 6; the New Practice Act, 24 Vict. chap. 10, 1861; 25 and 26 Vict. chap. 63, being the Merchant Shipping Act amendment act of 1862; and the rules of 1863.

In England, down to the time when Lord Mansfield became chief justice, November 8, 1756, and during his entire administration, as well as for centuries previous, there is hardly a shade of difference perceptible in the meaning of the words "admiralty" and "maritime," and the significance to be attached to them, in judicial proceedings, when they are employed to designate or define jurisdiction. In English dictionaries also, a similar use appears to have been made of them; and therefore the conclusion is arrived at, philologically, that there is no absolute distinction to be made in the application of these terms, either to courts, judges, or judicial proceedings in the English admiralty. Thus, the argument may be taken to be advanced one step, with plausibility, if not with certainty.

Hence, whether a critical or practical view be taken of the subject, or, if it be viewed historically, since the year 1266, when the term "l'Amiral" first appears to have been adopted to designate the commander of a fleet or naval force, there seems to have been an almost unbroken and uniform usage, both in the courts of common law and admiralty, in fixing the meaning of the words "admiralty and maritime." Indeed, there is

scarcely any variation. From 1272 to 1815, such has been the accepted use of the terms; and no other had ever been claimed until the decision given in *De Lovio v. Boit* (2 Gall. 398). In that case, the judge for the United States First Circuit Court innovated, or judicially attempted to do so. The learned jurist, then presiding in that court, promulgated a novel doctrine and pronounced a decision, which has since been much controverted, and still remains an open question, never having been as yet reaffirmed in the appellate court.

The words "admiralty and maritime" had previously been deemed to have been employed in the Constitution and general Judiciary Act of the United States, as apparently descriptive of the same identical jurisdiction, and for twenty-six years that hypothesis remained undisturbed. But in pronouncing judgment in *De Lovio v. Boit*, that the United States district courts, as admiralty courts, might take cognizance of suits on policies of insurance, Mr. Justice Story accompanied that decision by an historical exposition, together with an elaborately prepared opinion, in which he reviewed at length the subject of admiralty jurisdiction and its history; confidently concluding, that there existed a clear distinction in the meaning of the words "admiralty" and "maritime," and that the latter, by the framers of the Constitution, and the early legislators under it in 1789, was used, *ex industria*, to signify somewhat more than the former term "admiralty," in defining the limit and extent of jurisdiction conferred upon the United States district courts as admiralty courts.

And this result was reached by a process, which may be said to be characteristic of that learned magistrate; but not without manifest misgivings as to the entire

sufficiency of any citable authority for it, though himself, evidently, self-confident of the soundness of his own conclusions, and justice of his own interpretation.

The considerations for which this interpretation seemed to him to be demanded were, juridical logic and national policy; while the only authority, avowedly relied upon, was the forms of commissions, as issued to the English vice-admiralty judges, resident in the British colonial dependencies, prior to the American Revolution.

Now, if these considerations, alleged as demanding such interpretation, be sufficient to warrant it, then it is immaterial whether the cited authority be or be not conclusive. But if, on the other hand, the reasons assigned for the given judicial construction be unsound, or even questionable, then the construction claimed to be just and necessary, may be not only unfounded but unwarranted: and, in that view, any authority which happens to be relied upon, may ultimately become not only material, but absolutely essential to sustain such decision. A mere misinterpretation cannot support any adjudication permanently.

In order to test the value of the authority referred to, it will be proper to examine the issued vice-admiralty commissions,¹ and the mode of issuing them as well as the purpose for which they were ordinarily issued. They were usually quite specific; and enumerated, in detail, numerous subjects, many of which were confessedly within the admiralty jurisdiction, while others are not discovered to have been previously known in any admiralty practice, or to be gathered from any admiralty reports, then or now published; and among these others,

¹ *Vide* Appendix (C).

so enumerated, one was expressly so introduced, as may be seen in the commission to which reference is made by the court in *De Lovio v. Boit*. That subject was policies of insurance, and this alone constitutes the authority upon which the interpretation is founded and the decision sustained.

And from this incident, it seemed to be demanded by national policy and judicial logic, that libels on policies of insurance should be determined by the court to be within the cognizance of the United States district courts, sitting in admiralty, and, from the time of that decision, in 1815, its doctrine has been repeatedly sanctioned in the first circuit, during the period for which the learned magistrate, who first pronounced the decision, continued to preside in the court for that circuit. It was affirmed by Mr. Justice Story in 1822, in the case of *Peele v. The Merchants Insurance Co.* (3 Mason, 27), and reaffirmed by him in 1842, in the case of *Hale v. The Washington Insurance Co.* (2 Story, 176). It was acquiesced in by District Judge Davis, and has been expressly adopted and adhered to by Judges Ware and Sprague, as established law and the settled rule of practice in the district courts of the first circuit. Moreover the opinion is claimed to have been sanctioned in the second and third circuits; favored by C. J. Marshall and Mr. Justice Washington; by Mr. Justice Thompson, in the *Sloop Mary* (1 Paine, 673), and deliberately adhered to by its author twenty-seven years after its original promulgation in 1815.

On the other hand, it has been controverted and doubted by Justices Johnson, Baldwin, Campbell, Daniel, Woodbury, and, it may also be added, by Mr. Justice Curtis in *The Gloucester Insurance Co. v. Younger*. Cer-

tainly these judges have all deliberately questioned the general reasoning by which the opinion was sustained (Mr. Justice Woodbury designating it as "mere *dicta*"), if they have not positively disavowed the decision.

Beside, Chief Justice Taney, still more recently, in a dissenting opinion, drawn up in behalf of a minority of the Supreme Court (consisting of himself and Justices Wayne, Nelson, and Grier), has expressly said, that this decision of the judge of the first circuit has never as yet been followed by the judge of any other circuit. In the case of *Taylor v. Caryl*, 21 How. 615, referring to 1 Kent, 407 *n.*, in which the author had given a synopsis of subjects for admiralty jurisdiction, including "insurance," the Chief Justice (Taney) says, "It is stated too broadly, broader than the court has sanctioned; for as regards the jurisdiction in policies of insurance, I believe it has never been asserted in any circuit but the first; and certainly has never been brought here for adjudication."

Since, therefore, it appears that some of these last-named judges (Wayne, Nelson, and Grier) were generally supposed to be inclined to favor an extended admiralty jurisdiction, it would seem that the chances for an affirmation of the long controverted decision in *De Lovio v. Boit* by the appellate court, were at least questionable. What may be the judicial action in this respect, of the new judges, Clifford, Swayne, Miller, Davis, Field, and C. J. Chase, is a problem, of which the public and profession are not yet in possession of means to enable them to judge with reasonable certainty. The present organization of the Supreme Court, with its new elements introduced, may materially change the balance of power; and exhibit, in its future decisions, a novel, if

not possibly an improved character. At present, it is not very material to know what may be the final decision of the whole court; but it is, however, material that this question, so long kept in abeyance, should be definitely settled, in order, not only that the law, but the practice, in the several district courts of the United States should be, in this respect, hereafter uniform throughout the country.

Chancellor Kent, in his Commentaries (vol. i. p. 413, note), designates the views of Mr. Justice Story as grasping, and laments that the Supreme Court have not been required, as an appellate court, to review and solemnly and definitively pass upon the decision in *De Lovio v. Boit*. His precise language is as follows: "It appeared to me, therefore, upon a reconsideration of the subject, that the elaborate decision in *De Lovio v. Boit*, grasped at too much jurisdiction."

In the case of *Peele v. The Merchants Ins. Co.* (3 Mason, 27), the question was raised by counsel in the first circuit, and diligent preparation was made (as the writer well remembers) for rearguing the case at Washington. But it somehow failed, and never came on for argument. Mr. Justice Curtis in *The Gloucester Ins. Co. v. Younger* (2 Curtis, 322), seems to have thought there should have been an argument. He says, "Either from want of confidence felt by the bar, in the ultimate establishment of the jurisdiction by the Supreme Court of the United States, or from some other cause, the jurisdiction in admiralty has been very infrequently resorted to:" "and, since *Peele's* case, a libel on policies of insurance has not been filed in the district, where the amount in dispute would allow an appeal."

In the third volume of Mason's Reports, the first two

cases there reported were insurance cases (one that of *Peele v. Merchants Ins. Co.*), in which the same counsel were engaged, but with some slight change of side.

In *Baines v. The Schooner James and Catharine* (Baldwin, 554), determined in 1832, the controversy was about wages. But the claimant, who intervened, made an attempt to get allowed an account in set-off for provisions and other articles, previously furnished to the libellant. But the offset claimed was disallowed, after an elaborate and extended review of the whole general subject of admiralty jurisdiction in the United States. And Mr. Justice Baldwin, in giving his opinion, made use of the following language: "If an admiralty jurisdiction exists in the United States in suits at common law, commensurate with the claim here made, its assertion is, in my opinion, a renewal of the contest between legislative power and royal prerogative, the common and civil law striving for mastery; the one to secure, the other to take away the trial by jury. And until the authoritative judgment of a higher court shall make it my duty to surrender my judgment to their decree, it will never be sanctioned by me."

At an earlier period, 1827, in *Ramsey v. Alegre* (12 Wheat. 611), twelve years after the decision in *Gallison*, the discussion by individual judges was quite significant. A libel was filed for repairs made, amounting to \$2,428.84, for which sum a note had been given; but, at the time of instituting the present process, had not been surrendered up. A question of jurisdiction was interposed; the libel was dismissed as *coram non judice*, both by the district and circuit courts; and the judgments of those courts were afterward affirmed by the Supreme Court of the United States. Though there

was no difference of opinion among the individual judges as to what ought to be the final disposition of the case, yet Mr. Justice Johnson, though assenting to the court's decree, took that occasion to read an elaborate opinion, in the course of which (p. 566) he said: "I think it high time to check this silent and stealing progress of the admiralty in acquiring jurisdiction to which it has no just pretensions."

"Unfounded doctrines, not put down, and *dicta* and decisions, being permitted to remain on the books, and acquiesced in by the courts, afford facilities for interpolating doctrines which belong not to the law."

"The test of admiralty jurisdiction is, when suit is instituted, if prohibition shall issue, then jurisdiction is either taken away or never existed;" "the only test is seaman's wages, which *probat regulam*."

"If the common law can try the cause and give full redress, that alone takes away the admiralty jurisdiction."

"Some extravagant admirer of admiralty jurisdiction, or royal prerogative in England, rises to revive the ancient murmurs uttered by the friends of that court, when reluctantly putting off its usurped powers;" "not content to leave it as they found it; but employ themselves in efforts to revive what they cannot but acknowledge has been long extinct."

In the *Steamer St. Lawrence* (1 Black, U. S. Sup. Ct. Rep. 522), it was distinctly determined, that admiralty jurisdiction was given to the Federal courts by the Constitution, and could not be enlarged by the States or Congress; but that Congress might prescribe the forms of carrying it out. And in that case, Chief Justice Taney held this language: "Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by Con-

gress to the Federal courts, in general terms; and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries, in the powers and duties conferred to them; the extent of the jurisdiction conferred, depending very much upon the character of the government in which they were created, and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States."

In *The Propeller Commerce*, 1 Black, 574, Mr. Justice Clifford reiterates the decision pronounced in *Philadelphia, Wilmington and Baltimore Co. v. The Philadelphia and Havre de Grace Co.* (23 How. 215), that "the exception *infra corpus comitatus* is not allowed to prevail;" and refers, with approbation, to the three prior cases of *The De Soto* (5 How. 452), *The Genesee Chief* (12 How. 443), and *The Magnolio* (20 How. 298), as decisive, that wherever a suit *in rem* is prosecuted in any district where the offending thing is found, admiralty jurisdiction is not taken away because the tort was within the body of the county; that locality is in torts the test of jurisdiction, and that in cases of collision, occurring on navigable waters emptying into the sea, or bays and gulfs forming part of the sea, maritime courts have jurisdiction.

Mr. Justice Woodbury has, in two elaborate opinions, controverted the positions maintained in *De Lovio v. Boit*; agreeing, generally, in opinion with his associates on the bench, Justices Campbell and Daniel, in their unreserved and positive objections to the extension of admiralty jurisdiction, unless through the legislative action of Congress. In *The United States v. The New*

Bedford Bridge,¹ Judge Woodbury gave a very elaborate reading upon the nature and extent of admiralty jurisdiction over torts and crimes. In the case of *The De Soto*,² the same judge, in a very full discussion of admiralty jurisdiction, and in reference particularly to his predecessor's decision in 1815, says: "It certainly seems much wiser, in doubtful cases, to let Congress extend our power, than to do it ourselves, by construction and analogy."

In the case of *The Gloucester Ins. Co. v. Younger* (2 Curt. 322), Mr. Justice Curtis, commenting on the cases of *Peele*, in 3 Mason, 27 (decided in 1822), and *Hale*, 2 Story, 176 (decided in 1842), both of which followed and affirmed *De Lovio v. Boit*, says: "Though the question has never come before the Supreme Court of the United States, other inquiries concerning the extent of the admiralty jurisdiction, conferred by the Constitution, have there arisen, and given rise to great research and much acute discussion. They have resulted in pretty wide differences of opinion among the individual judges."

He cites *Waring v. Clarke*, 5 How. 441; *The New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 334; and *The Genesee Chief*, 12 How. 443.

In *Cutler v. Rea*, 7 How. 729, it was held that the owner of a ship could not assert a claim for general average against the consignee of the cargo, though the consignee had received the goods, by libel *in personam*; and Mr. Justice Curtis adds: "This decision certainly goes pretty far towards overruling the decision in *De Lovio v. Boit*, and is, undoubtedly, irreconcilable with some of the positions which are reported therein."

"But it does not cover the precise question, whether

¹ *Woodbury and Minot*, 441. ² *Waring et al v. Clarke*, 5 How. 441.

a policy of insurance is one of those maritime contracts within this jurisdiction."

He says the question is historical, not to be settled by reasoning *a priori*, which would lead to "theoretical anomalies."

Although in the case of *Younger*, Judge Curtis followed the practice of his circuit, and upheld the jurisdiction in policies of insurance, he did so "holding himself free to go into it at large, and with all the aids of more recent investigations, when it shall arise in the appellate court."

Mr. Justice Campbell, in *Jackson v. Steamboat Magnolio*, 20 How. 335, referring, in giving a dissenting opinion, to the case of *De Lovio v. Boit*, said: "The question of jurisdiction arose on a libel founded on a policy of insurance, and the jurisdiction of the court was sustained. I believe I express a general, if not universal opinion of the legal profession, in saying that this judgment was erroneous. I understand Judge Curtis to intimate the existence of such an opinion in *The Gloucester Ins. Co. v. Younger*, 2 Curt. 322."

Mr. Justice Daniel, who uniformly controverted the pretensions for an extended admiralty jurisdiction, and never, while on the bench, lost an opportunity to protest, but invariably dissented from the whole court, also understands Mr. Justice Curtis to expressly disavow his predecessor's decision in *De Lovio v. Boit*.

Here may well be recorded a particular and general regret that, as in the case of *The John Perkins* (21 L. Rep. 87), the distinguished jurist, presiding in the first circuit, did possibly adhere too tenaciously to a precise technical rule, in order to reverse a seemingly fair admiralty decision of Judge Ware; so, in the case of *The*

Gloucester Ins. Co. v. Younger (2 Curt. 322), the same circuit judge appears to have surrendered too readily his obvious legal convictions, in order to conform to a questionable practice, prescribed by a single precedent, and that sustained only in the first circuit where it was first pronounced.

The professional regret is more poignant, inasmuch as the court, by following its judicial convictions, in this latter case, would have secured (what many desired) a final rehearing of the decision in 1815 before the Appellate Court at Washington, the loss of which all now must deeply lament.

Though the precise question, whether the district courts of the United States could, in admiralty, take cognizance of suits or libels on policies of insurance, has not been directly passed upon by the Appellate Court, nevertheless, the subject of admiralty jurisdiction, in general, has often been before that court, and elaborately discussed by its individual members when incidentally brought there for consideration; and whenever so discussed, great learning and much research have been exhibited in such discussion. The chief and prominent topics so dealt with have usually been Writs of Prohibition in England, and when upheld; the effect of the restraining Acts of the 13th and 15th of Richard II. (now repealed); the Ordinance of Hastings in 1272; the Agreement of 1575; and Coke's answer to its seventh Article; the Resolutions of 1632; the Acts during the period of the English Commonwealth of 1648; the Restoration, and the consequent repeal of those Acts in 1660; the legislation by Parliament in 3 & 4 Wm. IV.; also in 3 & 4 Vict. chap. 65, and 17 & 18 Vict. chaps. 78 and 104; the old English tests of locality, *infra corpus*

comitatus and *infra primos pontes* ; nature of the Contract and Tort; contests of the Civil and Common-law Courts in England; the United States Constitution; the General Judiciary Act of the United States in 1789; also that of February 26, 1845; States rights, and right of trial by jury generally.

While the great struggle was going on in England, and after the "*Lex Mercatoria*" had been published, and the acts of 1648, under the Commonwealth, were adopted, the subject of admiralty and maritime law also occupied the attention of the Colonists in America. In Massachusetts, as early as 1650 and 1651, this subject was noticed by its Legislature.

In the Massachusetts Records, vol. iii. page 193, it appears that the General Court, May 23, 1650, deemed the "Commonwealth defective for want of Lawes in mary-time affayers; but as there were many good lawes in our land, in the French nation and other kingdoms and nations," it therefore ordered a committee to peruse the "*Lex Mercatoria*," so that this court might adopt such as it approved.

But that committee, not having met, on October 14, 1651, the court thereupon appointed Mr. Nowell and the Auditor-General to act and report to the next General Court. If any report was ever made, no definitive action was taken by the General Court, until October 14, 1668 (Mass. Rec., vol. iv. part 2, page 388), when it adopted the first admiralty code in this State, which will be found printed in full in Appendix (D). While it indicates that the rights of owners, duties of masters and mariners, average, collision, damage, punishments, desertions, negligence, proper equipment and supplies for vessels, etc., were cognizable by this maritime court;

which was constituted expressly "for the better ordering" of "the navigation and maritime affairs" of this jurisdiction, then "growne to be a considerable interest," still the title of insurance is not named or even alluded to.

In 1672 (*ibid.* p. 575), it was ordered that "henceforth all cases of admiralty shall be heard and determined by the Court of Assistants, and to be issued by the bench without a jury," unless for cause satisfactory to the court.

In this review of a single decision, the judicial ability of its author, his learning and labors, are duly appreciated and fully recognized.

Perhaps to the comments of others, one other reference should be added, rather by way of suggestion than as an assumption or implication, that any important matter had been left unconsidered, or overlooked by those who had hitherto entered upon and seemingly exhausted the discussion; and this reference may or may not have force and effect in fixing the meaning of the terms "Admiralty" and "Maritime," and limiting or qualifying their significance in defining jurisdiction.

In Great Britain, neither the Admiralty Court, known as the High Court of Admiralty, nor the appellate admiralty courts, known as that of the Lords Commissioners, Delegates, or Judicial Committee of the Privy Council, appear to have ever, at any time, taken cognizance of cases arising on policies of insurance.

But, on the contrary, for this particular class of cases, at the period when Sir William Blackstone prepared his Commentaries, there had existed in London, a special court, denominated "The Court of Policies of Insurance."

Vide 43 Elizabeth, chap. 12.

In the chapter on Courts of Special Jurisdiction (3 Black. 74, 75), that learned commentator gives an account of this special court, which will be found in full in the Appendix (E).

At first, these matters of assurance were submitted in London to a course of arbitration by "grave and discreet merchants" appointed by the Lord Mayor; but "divers persons" having "withdrawn themselves from this course," "had driven the assured to bring separate actions at law against each assurer:" and, therefore, by an enabling act, Parliament empowered the Lord Chancellor to "grant a Standing Commission to the Admiralty Judge, Recorder, two Doctors of the Civil Law, two common lawyers and eight merchants; three of whom could determine summarily these causes, subject to appeal solely to the Court of Chancery." Although the admiralty judge was one of this mixed commission of fourteen persons, and, on appeal, the decision of any three of them could be revised, in Chancery, yet no such power to review, revise, or reverse was ever delegated to the Lords Commissioners in Admiralty, to the Delegates, or Judicial Committee of the Privy Council.

Under these circumstances, may it not present a grave question for any one, whether policies of insurance were even by implication, embraced within the admiralty and maritime jurisdiction of England? And, if not, certainly such jurisdiction could not be deemed to have been conferred on the United States district courts, by the Constitution of the United States or the General Judiciary Act of 1789, unless by a violent and forced interpretation of the phraseology, "admiralty and maritime jurisdiction."

Now, whether the existence of this mixed standing commission in England to hear and determine causes of insurance, and denominated "a Court of Policies of Insurance," be reconcilable with the doctrine contended for and the construction claimed in the decision of *De Lovio v. Boit*, may be well and safely left to the members of the profession to determine, each for himself, according to their varied convictions, prejudices, or predilections.

Certainly, should a case of sufficient magnitude again arise, in which the question could be fairly presented to the full court at Washington, it is quite desirable to have it carried there; and it would seem to be, at least, doubtful if the decision of 1815 would there secure an affirmative sanction.

But if the enlarged jurisdiction, as exercised hitherto in the first circuit, should, as matter of policy or convenience, be deemed the better practice, let Congress directly interpose (if it can constitutionally), and supply at once the needed legislation for all the circuits. Surely, in this country, congressional would seem to be preferable to judicial legislation. In England, many acts of Parliament, during the long and useful judicial career of Sir Stephen Lushington, have been passed, which materially extended the jurisdiction and improved the practice of the English Admiralty Court; and this important legislation, as I understand it, is due primarily to the counsel and just influence of that great and experienced admiralty judge.

And now, if harmony be desirable in the administration of the law in all of the United States circuits, then there should be uniformity in the legislation, conferring jurisdiction, and regulating the practice of the courts in

the several circuits. Congress alone can compel such uniformity, by applying the appropriate remedy. If Congress omit this high duty, a doubtful decision and unreliable precedent will still continue to disturb that harmony of action and practice, which ought to prevail, alike in all the different circuits of the United States, where questions of admiralty are likely to arise.

• NOTE. — Since completing chapter II., part 3d of Browning and Lushington's Reports have come to hand, and for the first time, I have examined "the Rules for Appeals in Ecclesiastical and Maritime Causes," adopted by the Privy Council December 11, 1865, to take effect from and after February 1, 1866.

These Rules are framed for the government of the ecclesiastical and admiralty courts in cases of appeal; and, it is to be observed, that while the courts are styled "Admiralty," their causes are called "Maritime," thus employing these terms substantially if not precisely as synonymous. This will become more apparent by referring to the preamble, caption, and several of the adopted rules.

By an act of 6 & 7 Vict., ch. 38, entitled "An Act to make further Regulations for facilitating the hearing of Appeals and other Matters by the Judicial Committee of the Privy Council," it was enacted, among other things, that the Judicial Committee might, from time to time, make such rules, orders, and regulations respecting the practice and mode of proceeding in all appeals, from the Ecclesiastical and Admiralty and Vice-Admiralty Courts, as to them should seem fit; these not to be of any force or effect until approved by her Majesty in Council. Accordingly, at the Court at Windsor, the 11th day of December, 1865 —

The Judicial Committee reported Rules, which her Majesty, by and with the advice of her Privy Council, saw fit to approve; and enjoined the Right Honorable Judge of the High Court of Admiralty, Dean of the Arches, and all other judges and officers of the said courts of admiralty and ecclesiastical jurisdiction, to take notice thereof and govern themselves accordingly. They were entitled "Rules for Appeals in Ecclesiastical and *Maritime Causes*."

First, provision is made for the meaning of certain terms; thus "Appeals" shall mean "an appeal to her Majesty in Council in Ecclesiastical and Maritime Causes."

So "Registry" shall mean "the Registry of her Majesty's Court of Appeals in Ecclesiastical and Maritime Causes."

"Registrar" shall mean "the Registrar of her Majesty in Ecclesiastical and Maritime Causes."

"Document" shall mean "Document, etc., under the seal of her Majesty in Ecclesiastical and Maritime Causes."

Thus, in 1865, the responsible legal advisers of the Crown seem to have used the terms "Admiralty" and "Maritime" as convertible: "Admiralty" to designate that court; "Maritime" to designate the causes of the Admiralty Court.

In the text page (14), the author attempted to establish a similar proposition; which attempt is now seemingly justified by the acts of the Judicial Committee of the Privy Council.

CHAPTER III.

MATTERS WHEREIN THE UNITED STATES FEDERAL COURTS ENTERTAIN AND DECLINE ADMIRALTY JURISDICTION.

HAVING, in the preceding chapters, treated of the origin and general restrictions of admiralty practice and jurisdiction, and having endeavored to define, with precision, the meaning of the terms admiralty and maritime, when employed to designate, either in England or the United States, a particular jurisdiction, I will proceed first to make a condensed statement of the different decisions made by our highest and most respected tribunals, in relation to matters of which the Federal courts, as admiralty courts, have already taken cognizance ; and will, afterwards, notice a few cases, in which the same courts have declined to entertain or exercise such jurisdiction.

In a series of cases, the Supreme Court, since its original organization under the Constitution, have solemnly decided that the Federal courts have and can exercise admiralty jurisdiction ; thus, in cases of salvage of one foreign vessel by the officers and crew of another foreign vessel : 2 Cranch, 240, *Mason v. Ship Le Blaireau* ; so, in suits to try the title to proceeds in the registry of the court : 3 How. 568, *Andrews v. Hall* ; in proceedings *in rem* to enforce a lien of material-men, for necessities and supplies furnished to a vessel in a port

to which she is foreign ; or, on the faith that such vessel is foreign, if so held out : 9 Wheat. 409, *St. Jago de Cuba* ; so, in case of a domestic vessel, if the local law gives a lien, material-men may enforce it in admiralty : 7 Pet. 324, *Peyroux v. Howard* ; so, in tortious seizures at sea, process *in rem* by libels to attach goods, rights and credits, in the hands of third persons or garnishees, may be sustained, without specifying the property to be attached, and, by that attachment, compel appearance ; and then proceed to a decree of condemnation to satisfy the claim : 10 Wheat. 473, *Mann v. Almeida* ; in this same case, it appeared that though the seizure was piratical, the civil remedy is not merged in the piracy ; so also, the Federal courts may exercise admiralty jurisdiction over contracts of affreightment to be performed on the sea, between the cities of Providence and New York : 6 How. 344, *New Jersey Steam Navigation Co. v. Merchants Bank* ; likewise, over claims for pilotage, even though State laws regulate both the service and its compensation : 10 Pet. 108, *Hobart v. Durgan* ; so, over seizures upon waters navigable from the sea, by vessels of ten or more tons burden : 4 Cranch, 443, *United States v. Schooner Betsy and Charlotte* ; and 7 Ib. 112, *Whelan v. United States* ; also, over informations in the District Court to enforce the forfeiture of a vessel, for exporting arms and munitions, contrary to the act of May 22, 1794 : 3 Dallas, 297, *United States v. La Vengeance* ; over questions of forfeiture arising under the same act prohibiting the slave-trade : 2 Cranch, 406, *United States v. Schooner Sally* ; over collisions occurring on the Mississippi River, above the ebb and flow of tide : 12 How. 466, *Fretz et al. v. Bull et al.* ; this last case, and *The Genesee Chief*, controlling and

overruling the decision given in *The Thomas Jefferson*, reported in 10 Wheat. 428 ; over collisions within the ebb and flow of tide on the Mississippi River, even if "*infra corpus comitatus* : " 5 Howard, 441, *Waring et al. v. Clarke*. This case was the colliding of the Steamer *De Soto* with *The Luna*, first tried by the District Judge, McCaleb, at New Orleans, and, on appeal, finally determined by the Supreme Court in 1847.

. In the year 1850, by the decision of the case of *The Genesee Chief*, 12 How. 443, admiralty jurisdiction, under the Constitution, was adjudged to be extended to the navigable lakes and rivers, without regard to the ebb and flow of the tides of the ocean. It was also determined that Congress had power to pass the act of 26th February, 1845, under the provisions of the Constitution ; and that the judicial power of the United States extended to all cases of " admiralty and maritime jurisdiction " and as regulations thereof.

In *L'Invincible*, 1 Wheat. 238, it was decided that, in prize questions, the Federal courts of admiralty will inquire, if the alleged wrongdoer is duly commissioned ; or, by the use of our territory to increase his force, has trespassed on our neutral rights ; and that the exclusive cognizance of prize generally belongs to the capturing power. Accordingly, courts of other countries refrain from extending redress for alleged torts, committed by public armed ships, in asserting and vindicating belligerent rights ; yet, notwithstanding the general rule, that the right of adjudicating, in prize questions, belongs to the courts of the captor's country exclusively, it appears, by the case of *The Estrella*, 4 Wheat. 298, that when the captured vessel comes voluntarily *within the territory*, or when brought *infra præsidia* of a neutral

power, that neutral power, through its established courts, may inquire if its neutrality has been violated by the capture; and if so, it becomes obligatory upon such courts to make restitution of the property. But this, however, is an exception, and so *probat regulam*.

When belligerents violate our neutrality, if the prize comes voluntarily within our territory, it is restored by the courts to its original owner: *La Amistad de Rues*, 5 Wheat. 385; but restoration is confined to the specific property, with costs and expenses pending suit; not inflicting vindictive damages, or awarding compensation for plunderage, as in cases of ordinary marine torts. If the original owner shall seek restitution upon the ground that our neutrality has been violated by the captors, the burden of proof is thrown upon the owner; and should a reasonable doubt remain as to the fact, jurisdiction would not be entertained or exercised by our courts.

Under the general law of nations, the Federal courts, without any specific act of Congress on the subject, would have ample authority to decree restitution of property, captured in violation of the territory: *The Estrella*, 4 Wheat. 298.

Jurisdiction of the Federal courts in admiralty and maritime causes is given by the Constitution, in general terms; its extent, therefore, is to be ascertained by a reasonable and just construction of the words used when taken in connection with the whole instrument: 1 Black. U. S. Rep. 522, *The Steamer St. Lawrence*. Chief Justice Taney, in giving the opinion of the court, in this case, says: "The court could not, consistently with its duty, refuse to exercise a power, with which the Constitution and laws had clothed it, when its aid was invoked by a

party who was entitled to demand it as a matter of right."

In *The Propeller Commerce*, 4 Wallace, 411, the court determined that the transportation of passengers by sea is as much a maritime contract in its nature, as is that for the transportation of merchandise; and, as such, would be cognizable in admiralty.

But, without being restricted in the citation of cases to such only as may have been finally determined by the United States Supreme Court, civil jurisdiction in admiralty, in general, is founded on the subject-matter; though, in torts, locality may still be a test. If the subject-matter of a contract relate to marine navigation, then the admiralty has jurisdiction, even though the agreement were entered into upon land: 4 Wash. C. C. 453, *Zane v. The President*; Paine, 671, *The Mary*.

Over ransoms, admiralty has exclusive jurisdiction: 2 Gall. 325, *Massonnaire v. Keating*; and, generally speaking, over all seizures for forfeiture: 2 Wheat. 1, *Slocum v. Mayberry*; 3 Wheat. 246, *Gelston v. Hoyt*; 4 Cranch, 443, *United States v. The Betsey*; 7 Ib. 112, *Whelan v. United States*.

Jurisdiction, however, was divested by a release and restoration of the property seized, before any legal proceedings were had resulting in any adjudication: in such case, the court, when once divested of its jurisdiction, could not be again invested therewith, or legally reinstated, but by a new seizure.

Although but one remedy is possible for a party, still the right to proceed *in rem*, in cases of maritime torts, is cumulative; and a party may, for remedy in tort, resort to process *in personam* as well as process *in rem*. 1 Pet. Adm. 94, 95, *Brevor v. Fair American*.

A parent may recover in admiralty damages for a wrongful abduction of his minor son, upon a voyage; and also wages for maritime service. 4 Mason, 380, *Plummer v. Webb*.

Displaced owners, by petitory suits, may be reinstated in the possession of their vessel. 5 Mason, 465, *The Tilton*.

Owners may sue their master for damage, consequent upon a wrongful capture, made by him. Bee, 369, *Dean v. Angus*.

Our courts may decree sale of ship and cargo if in their custody. 4 Cranch, 2, *Jennings v. Carson*.

Admiralty has cognizance over matters on land, if they be incident to those at sea. 2 Pet. Adm. 309, 324, *Moxon v. Fanny*.

Bottomry bonds, given by master or owner, and claims for supplies, furnished in a neutral port to a foreign vessel, are cognizable in admiralty: 2 Gall. 191, *The Jerusalem*; Paine, 671, *The Mary*; Bee, 78, *The Eagle*; Ibid. 116, *The Rainbow*.

And under appropriate heads, will be found proper references, indicating how far the admiralty courts have assumed, or may now rightfully exercise, jurisdiction over particular matters of a maritime nature; whether those matters have to do with the navigation and preservation of ships and shipping; the carriage of goods by sea, freight, bills of lading, charter-parties, the transportation of passengers or merchandise, or, generally, affect incidentally or directly the rights of shippers, freighters, owners, consignors or consignees, merchants, masters, mates or mariners.

But on the contrary, there are other decisions of our highest tribunal, by which the United States district

courts are restricted in the exercise of admiralty jurisdiction; and the Federal courts refrain from exercising such jurisdiction.

Such are the cases of *The Thomas Jefferson*,¹ in 1825; *The Steamer Orleans*,² in 1837, and *350 Chests of Tea*,³ and *Ramsey v. Allegre*,⁴ in 1827; *Cutler v. Rea*,⁵ in 1849; *Minturn v. Maynard*,⁶ and *Steamer John Jay*,⁷ in 1854. The case of *The Thomas Jefferson*, continued to be the established law, until the decision in *The Genesee Chief and Fretz et al. v. Bull et al.*, in 1850; when it was overruled; having stood twenty-five years uncontrolled by any adverse decision. Those of 1827 and 1837 still stand; that of 1849 is expressly disavowed by Mr. Justice Wayne, because it was not argued at Washington; while those of 1854 are recognized at the present time as declaratory of the true and just principles of admiralty jurisprudence in the United States.

The Thomas Jefferson was a case for wages, earned above the ebb and flow of tide, upon the Missouri River; the employment of *The Orleans* was deemed not substantially maritime: in the case of the *350 Chests of Tea*, the attempt was to enforce, by libel *in rem* in admiralty, a lien for duties on imported goods: in *Ramsey v. Allegre*, to maintain a suit *in personam* against an owner of a vessel, where he had given his note for the debt, and, at the time of the hearing, the note had neither been surrendered nor tendered: in *The John Jay*, to foreclose the mortgage of a vessel by sale or by transfer of the possession to the mortgagee: in *Minturn v. Maynard*, to obtain an account for moneys paid for the use of the owners of a steamer between them and their

¹ 10 Wheat. 428. ² 11 Pet. 175. ³ 12 Wheat. 486. ⁴ Ibid. 611.

⁵ 7 How. 729.

⁶ 17 How. 477.

⁷ Ibid. 399.

agent: and, in *Cutler v. Rea*, the owners of a vessel promoted a libel against the consignee of the cargo, to recover the contributory share, due in general average, from such consignee for cargo after it had been delivered to him by the master.¹ And in all of these various cases, the decision of the Supreme Court was adverse to the exercise of admiralty jurisdiction by the Federal courts.

Subsequent decisions are generally in harmony with the doctrines so promulgated by the highest authority in the United States; and the doctrine still remains, unless where the cases have been necessarily qualified by subsequent decisions; or controlled by the legislation of Congress in reference to admiralty, and especially by the act of February 26, 1845.

In the latest volumes of Howard's, Black's and Wallace's Reports, are adjudged cases upon salvage, collision, and bottomry, many of which abound in learned discussions and valuable legal suggestions upon the questions decided.

These decisions and the act of 1845 further confirm the doctrine of this country in regard to the extent of jurisdiction in maritime matters. In England also, by certain acts, as chaps. 65 and 66 in 3 & 4 Vict. and chaps. 74 and 104, in 17 & 18 Vict. (all passed through the influence or at the instance of Sir Stephen Lushington), admiralty jurisdiction has been materially enlarged. Not to mention convoy, ransom, and mortgages, its criminal jurisdiction is broader and now embraces other subjects of a maritime nature, not heretofore cognizable in admiralty courts.

But the prominent distinction in England and the

¹ But *vide* *Dupont v. Vance*, 19 How. 162.

United States is this : That whereas in England locality, tide-water, boundaries, and bridges still remain as formerly binding and decisive as a test of jurisdiction, here those tests have virtually, in regard to inland waters and county lines, ceased to exist. Not only is the English rule of *infra corpus comitatus* superseded by American decisions or abrogated by American legislation, but in the United States there is no necessity that a tort should occur within the ebb and flow of tide even in order to give the Federal courts jurisdiction over it in admiralty. These elements were inherent and vital in English admiralty; in the United States it is quite otherwise. The Federal courts now take cognizance of collisions on the Mississippi, above or below New Orleans; on the Missouri, where the water is salt or fresh, above or below the ebb and flow of tide; on the Yazoo, Elizabeth, Ohio, Alabama, Hudson, East and other rivers, Chesapeake, Delaware, Mobile, and other bays; and in short, on any of our great lakes or inland waters or rivers navigable from the ocean. Indeed, the arm of this jurisdiction embraces, practically, all American waters, and a much wider circle of subjects than has been confided to the British admiralty courts, at any time, since the war of prohibitions ceased in that country.

Without, then, turning aside to enumerate the various cases in the circuit and district courts, not brought by appeal or writ of error before our highest tribunal, it may well be affirmed that, in the United States, admiralty jurisdiction extends to whatever subjects were within its cognizance prior to the American Revolution; have since been included within it by courts of authority previous to or under the Constitution; and by virtue of the Judiciary Act of 1789, or any other subsequent

legislation of Congress. What is most marked, in our progress in this branch of maritime jurisprudence, is discoverable in the act of February 26, 1845, which is peculiarly distinctive of the United States. England still regards county lines, the ebb and flow of tide, and the first bridge of its rivers, the Thames, Humber, and others, as limiting its admiralty jurisdiction. In the United States, bridges, tides, and county lines are nothing. If a tort occur within our waters to a sailing or steam vessel, and the employment of such vessel is maritime, or essentially commercial, and the route or destination from one State or Territory to another State or Territory, the owners may lawfully seek redress in the Federal courts against the colliding or faulty vessel. There is here no prohibition. Since the act last referred to, there is almost unrestricted jurisdiction over such cases in admiralty.

That act provided that our district courts should "have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation, between ports and places in different States and Territories, upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide waters, within the admiralty and maritime jurisdiction of the United States;" and it further provides for parties in suits so brought, the same remedies, forms of process, and modes of procedure as in admiralty; also making the United

States maritime law the rule of decision in such cases; saving to parties the right of trial by jury on any issue of fact, where either party shall require it; and "a concurrent remedy at common law, where it is competent to give it; and any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation."

Thus a great advance was made in extending admiralty jurisdiction, when this act was passed; and grave doubts were suggested as to its expediency and constitutionality. Indeed, in 1850, 12 How. 443, in the case of *The Genesee Chief*, its constitutionality was directly questioned. But the Supreme Court adjudged the law to be constitutional, and subsequent proceedings in admiralty have been in accordance with that decision.

The gradual progress in the United States was duly observed in England. But a similar advance in Great Britain seemed impracticable, so long as the antiquated acts of Richard II. remained unrepealed. There were two of these parliamentary acts:—

1st. That of 13 Richard II., ch. 5, as follows: "It is accorded and assented, that the admirals and their deputies shall not meddle, from thenceforth, of anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble prince King Edward, grandfather of the king."

2d. 15 Richard II., ch. 3: "All contracts, pleas, and *querelas*, and all other things rising within the *bodies of counties*, as well by land as by water, and also wreck of the sea, shall be tried, etc., by the laws of the land, and *not* before nor by the admiral, nor his lieutenant in any wise."

By the act of Parliament 3 & 4 Vict., ch. 65, § 6, both of these ancient acts were repealed; and since 1841 the Dean of the Arches could perform the functions of an admiralty judge in his absence. By act 20 & 21 Vict., ch. 77, § 10, provision is made for the judge of probate to officiate when the office of admiralty judge may happen to be vacant; and since 1861, by 24 Vict., ch. 10, § 14, the Admiralty Court has been a court of record. Its powers seem now to be pretty precisely defined and greatly enlarged.

Mr. Justice McLean in *The Magnolio*, 20 How. 335, referring to the act 3 & 4 Vict., says, that "Statute has placed English admiralty substantially on the same footing that it is maintained in this country. To this remark, it is believed there are but two or three exceptions. Insurance, ransom, and surveys are believed to constitute the only exceptions. Whether an *insurance* is within the admiralty, has not been considered by this court."

Jurisdiction is the power to hear and determine a cause. 6 Pet. 691, *United States v. Arredonte*. In admiralty courts, the exercise of this power ought never to be declined, from considerations of policy, convenience, or in deference to others. The public and parties have some concern with the personal opinions as well as right to the judicial decrees of an admiralty judge. Ordinarily, he hears and decides without a jury. Without being possessed of legal jurisdiction, he cannot, even by agreement, be clothed with it. 20 How. 583. He should not, *a fortiori*, then refuse to exercise jurisdiction, where he may manifestly be clothed with it when acting without a jury.

A good judge of admiralty may and should become a

truly great magistrate. Such an one may make for himself and leave to the nations a name and praise among men.

While his office may occasionally call for the most exacting investigation of great and grave questions of international and general maritime law, it also brings him in almost daily contact with a class of persons, who, as suitors, need sympathy and protection, and often deserve favor.

As a judge, then, he should be tender and not timid ; fond of the principles of admiralty law, and not unfamiliar with the details and practice of this interesting branch of jurisprudence ; devoted to his daily duties, and quietly but firmly discharging them, so long as health may permit him or his own personal tastes be content to retain office.

But above all, let him thoroughly eradicate all political aspirations : indulge in no delusive visions of other public distinctions ; leaving only for himself that chastened ambition, which is swayed and satisfied by naught else save a desire to do right and perform his duty well and wisely, while acting as judge.

Such a judge may not want the occasion, and will find ample time, to enable him to devote his mind and all its energies, duly to discharge the appropriate functions of his position ; and if so, he may rightfully be classed with Stowell and Lushington in England, and Sprague in this country ; all of whom have been eminently successful in their judicial career ; the latter also conspicuous as a model of official courtesy and courage.

On some occasions, the admiralty has been unjustly arraigned as inconsistent with free institutions. The noble vindication of it by Chief Justice Taney should

disabuse the public mind of all future prejudice. In *Taylor v. Caryl*, 20 How. 615, he says: "I can therefore see no ground of jealousy or enmity to the admiralty jurisdiction. It has in it no one quality inconsistent with or unfavorable to free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity in every just and enlightened commercial nation.

"The delays unavoidably incident to a court of common law, from its rules and modes of proceeding, are equivalent to a denial of justice, where the rights of seamen, or maritime contracts or torts are concerned, and sea-faring men the witnesses to prove them; and the public confidence is conclusively proved by the well-known fact, that in the great majority of cases where there is a choice of jurisdictions, the party seeks his remedy in the Court of Admiralty in preference to a court of common law of the State, however eminent and distinguished the State tribunals may be."

All the cases cited upon jurisdiction may be profitably reëxamined and studied by the reader. *De Lovio v. Boit* in 1815; *The Thomas Jefferson* in 1825; *The Orleans v. Phœbus*, 1835; *The Coomb's case*, 1838; *The New Jersey Steamboat Navigation Co. v. Merchants Bank*; *Clarke et al. v. Waring et al.*, 1848; *The Genesee Chief and Ontario*, 1851; *Fretz et al. v. Bull et al.*, 1851; *Walsh v. Rogers*, 13 How. 283; *The Magnolio*, 1857; *Taylor v. Caryl*, 20 How. 615; *Grant v. Poullon*, *ibid.* 162; *Hemmenway v. Fisher*, *ibid.* 255; *People's Ferry Co. v. Beers*, *ibid.* 393; *Snow et al. v. Hill et al.*, *ibid.* 543.

Admiralty jurisdiction in the United States, then, extends to cases involving the claims of material-men;

mariners' wages ; contracts of affreightment ; bottomry and respondentia bonds ; possessory and petitory suits between part-owners ; salvage, collision, necessary supplies and repairs in foreign ports ; survey and sale of damaged or disabled ships ; pilotage, wharfage, consortship, spoliation and damage, assaults, imprisonment and other torts at sea ; ransom, convoy ; demurrage ; all questions of prize and its incidents, including claims for damages and costs in cases of wrongful capture ; seizures ; also to all criminal cases for which there is any express legislative enactments since 1789 ; such as seizures for violation of the customs, post-office or revenue laws, and all such other offenses as may be deemed and declared to be criminal by congressional enactments.

CHAPTER IV.

COLLISION.

HAVING stated all that seemed to be necessary and useful upon jurisdiction generally, the subject of collision in American waters shall next claim attention, as being one which has already required the consideration of the American courts to a considerable extent, and is likely, in future, to demand still more of the time and attention of courts.

A large class of marine torts, denominated cases of collision, are properly embraced within the admiralty jurisdiction of the United States.

Certain technical rules, which apply to like cases in England (and possibly originating from its insular position), are in the United States measurably abrogated, superseded, or at least greatly extended; such are especially those relating to the ebb and flow of tide and to the fresh or salt qualities of tide-waters, and "*infra primos pontes*" of its principal rivers.

A series of decisions of the Supreme Court are reported, most of which, with perhaps one exception, may be deemed and considered as the prevailing and established law of the land. The General Smith, Magnolio, Genesee Chief, Monticello, New York, and Oregon, decided by the Supreme Court at Washington, were much considered, and are decisions of weight and authority.

The Thomas Jefferson has for many years ceased to be authority, having been overruled.

And by these cases and others, the doctrines established as rules of proceeding and decision in admiralty, in cases of collision, are, that process *in rem* is sustainable in the United States district courts for collisions occurring on the Mississippi, Missouri, Alabama, and other great inland rivers and waters, whether above or below the ebb and flow of tide, or within the bodies of counties even (*infra corpus comitatus*); and, since the passage of the act of February 26, 1845, also in cases of tort occurring on our great lakes and other inland waters, as well as on waters "navigable from the sea."

Early, indeed, in our political history and life as a people under the Constitution, waters "navigable from the sea" were embraced within the admiralty jurisdiction of the United States, particularly in cases of seizure.

In § 9, of the Judiciary Act of 1789, it is expressly provided, that "the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts or upon the high seas; and shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of import, navigation, or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, when the common law is competent to give it."

And this, as yet, remains unmodified by Congress, as the clause is above cited, unless it be to extend its meaning; and also unqualified, save by a doubtful interpretation pronounced as the opinion of the Supreme Court in the case of *The Thomas Jefferson* in 1825, but since adjudged ill-considered and erroneous in 1850.

This case having ceased to be law, or a rule of decision or authority, the law of 1789 must still prevail in our courts, together with a little added jurisdiction, conferred upon the district courts by Congress, in the years 1835-1845, 1848 and 1853.

In those districts of the first six circuits on the seaboard, where foreign commerce has chiefly flourished, especially in the First Circuit, numerous decisions have been given in cases of collision occurring at sea and on "waters navigable from the sea;" many of which are well considered, accurately stated, and of high authority; so that whenever cited as precedents in argument, they are generally deemed conclusive in analogous cases arising in courts.

Such are those in Gallison's, Mason's, Sumner's, Story's, Woodbury and Minot's, and Curtis' Reports. So also are those in Ware's Reports, and the many as yet uncollected opinions of Mr. Justice Clifford upon this subject.

In 1 Sprague's Decisions, there are nine different cases reported upon collision; all well reasoned, stated and determined, and deserving the highest respect as authorities upon this subject: *The Schooner Lion* (p. 40); *The Rival* (p. 128); *Lenox and Winnisimmet Ferry* (p. 160); *Allen v. McKay* (p. 219); *The Osprey* (p. 245); *The Clement* (p. 257); *The R. B. Forbes* (p. 328); and *The Julia M. Hallock* (p. 539); all decisions upon

collisions investigated and tried in the Massachusetts District Court, in each of which judgment was pronounced by Judge Sprague since 1840.

His immediate predecessor was the Hon. Judge Davis; and the predecessor of Judge Davis was the Hon. John Lowell.

In the Second Circuit, which embraces the Southern District of New York, Judge Samuel R. Betts long presided ; and the reported decisions of this distinguished jurist, like those of Judge Sprague, have come to be considered of about as high authority by the profession, as if pronounced by the principal judge of the circuit.

Judges Robert Troup, John Sloss Hobart, William P. Van Ness, Elijah Paine, and Pierpont Edwards were predecessors of Judge Betts.

In the Third Circuit, including Pennsylvania and New Jersey, Justices Washington, Baldwin, and Grier have presided in the Supreme Court ; while in the district courts of that circuit, have presided Judges Hopkinson, Peters, Morris, Pennington, Rossell, and Dickinson; and their recorded decisions will be found in the Reports of Washington, Hopkinson, Peters, Baldwin, Gilpin, Crabbe, and Wallace, Jr. The Admiralty Reports of Richard Peters, Jr., are both a mine and manual of marine law.

The Fourth Circuit comprises Maryland ; and some admiralty decisions of Judge Winchester may be found in Peter's Jr.'s Admiralty Decisions. But there is no regular book of reports for that district and circuit.

In the Fifth Circuit, heretofore the South Carolina Circuit, Judge Bee long presided, and with great ability. His Reports contain numerous and various admiralty

decisions of weight and authority, and exhibit their author as a learned and upright magistrate; administering the law in the true spirit of a competent admiralty judge, fitted for his position, and devoted to the discharge of its various duties.

The Sixth Circuit includes Louisiana, of which State New Orleans is the great commercial centre and port of entry. In consequence of the extended foreign and inland navigation and commerce carried on, at, from and to New Orleans, that port has been productive of many cases of collision and other marine torts, which resulted in obtaining from the Supreme Court decisions of great practical importance, and have become precedents of leading authority. Such is the case of *The Steamer De Soto*, adjudicated at Washington in 1847. It is reported in 5 Pet. 441, and usually cited as the case of *Clarke et al. v. Waring et al.* On the Mississippi River, ninety-five miles above New Orleans, the *De Soto* collided with the *Steamer Luna*; and Thomas Clarke, the master of the *Luna*, libelled the *De Soto*, for loss and damage occasioned by the collision. The original hearing was before Judge Theodore H. McCaleb, who, in the United States District Court, decreed for the libellant damages at \$12,000, and the sale of the *De Soto*.

From this decree the claimants, Nathaniel S. Waring and Peter Dalmar, appealed. There was a libel and supplemental libel; and an answer and supplemental answer also; and the case was argued by Reverdy Johnson for the libellants, and J. J. Crittenden for the claimants.

The question argued was a want of jurisdiction in the District Court as a court of admiralty; which was

affirmed to belong to the District Court by a majority of the judges; and the opinion of the court was given by Mr. Justice Wayne in behalf of his brethren, Chief Justice Taney and Justices McLean and Nelson; while Catron, Daniel, Woodbury, and Grier dissented.

It may not be superfluous to give in brief the doctrine flowing from this decision; and these were —

1. That the grant of admiralty jurisdiction was not limited to, nor interpreted by, the cases in England decided when the Constitution of the United States was adopted in 1789.

2. That such jurisdiction is not taken away because the common-law courts have concurrent jurisdiction.

3. That our admiralty courts have jurisdiction in torts and collisions happening on the high seas, within the ebb and flow of tide, as far up inland as the tide ebbs and flows, though *infra corpus comitatus*.

4. That the saving clause in § 9, of the act of 1789, means that concurrent jurisdiction does not take away jurisdiction from the common-law courts.

Several members of the court gave separate prepared opinions. Woodbury, J., gave an elaborate dissenting opinion, in which Justices Daniel and Grier expressly concurred, and Mr. Justice Catron gave a brief opinion of his own. •

The court reviewed all the former cases, 10 Wheat. 428, *The Thomas Jefferson*; 7 Pet. 342, *Peyroux v. Howard*; 11 *ibid.* 175, *The Orleans v. Phœbus*; 12 *ibid.* 72, *United States v. Cooms*, etc.; in which locality gives jurisdiction, and deem it to be *res adjudicata*.

Smith v. Condry, 1 How. 28, also originated in New Orleans. There the subject of damage in cases of collision is discussed, and the American rule stated; and

it was there determined that the question, by whose fault a collision happened, was a proper question for a jury to decide.

In these six circuits, which comprise the more commercial districts of the United States, have occurred more marine cases than in all the other circuits, and consequently the reports for adjudication in admiralty are chiefly to be looked for in the district courts at Boston, New York, Philadelphia, Baltimore, Charleston, and New Orleans. Since 1845, the enlarged jurisdiction reaches the inland waters and great lakes of the country, and collisions there may be frequent, notwithstanding all the precautions of Congress, merchants, and navigators. California has yet hardly entered upon this branch of the admiralty law, but will doubtless soon commence its discussion and furnish material for its District Court and the profession.

As to the rule of damages in cases of collision, the ancient maritime law exacted full compensation from the faulty colliding vessel and its owners; and this same rule was practiced upon up to the time of the enactments of 7 Geo. II. 15; 26 Geo. III. 86 and 159, and 17 & 18 Vict. 104, § 503. By these acts of Parliament the rule was so modified as to substantially conform to that first adopted by Holland, among the European nations; and that was to limit the amount of damage to the value of the ship or property exposed to hazard.

To encourage trade and commerce, and protect ship-owners against indefinite and consequently disastrous liability, to which they seemed to be held in the case of *Walter v. Brewer*, 11 Mass. 99, the Legislature of Massachusetts, in February 20, 1819, (Stat. 1818, ch. 122),

first introduced a limitation to that liability in certain specified cases. Ship-owners ceased thereby to be liable for the misconduct of masters and mariners beyond the value of the ship and freight; and a charterer was considered the owner, if he undertook to man, victual, and navigate another's vessel at his own expense; that is, *pro hac vice*, the charterer was, in contemplation of law, owner. Those provisions were reenacted in 1836, (Rev. Stat. ch. 32, §§ 1-4), and, in some respects, extended; and are now to be found in the same form in the General Statute of 1860, ch. 52, §§ 18-21; and the same principle is adopted by Congress in the act of 1851, ch. 43, §§ 3, 4, and 5. These sections, with some qualification, supersede State laws; and render further State legislation superfluous. What is law in Massachusetts now, is also law for all the other States of the American Union.

What is quite noticeable, the act of Congress is almost an exact transcript of the law of Massachusetts. Not only is the ship-owner's liability circumscribed in both, but in both he has the privilege to surrender to freighters, or a trustee for them, all his interest in vessel and freight, and thus stay all legal proceedings against him, and protect himself entirely against all liability for further costs of litigation.

In England and the United States, as well as Holland, the liability of ship-owners to damage is limited to the value of the vessel in fault and her freight; and though in *The Public Opinion* (2 Hag. 398), which was a cause of collision, occurring in the river Humber, the court decided that torts of this description were not subjects of admiralty jurisdiction when arising *infra corpus comitatus* in England; yet it is held otherwise, as has been

seen, in the United States, in a series of decisions, as well as settled also by congressional legislation; and now not only do these decisions apply to torts upon our rivers and other inland lakes and waters, but reach cases of collision of ships at anchor in land-locked harbors, or at the wharves, if water-borne, of our great ports of entry. It would seem to be an indispensable consideration to the recovery of damage, however, that at the time of the injury both colliding vessels should be *water-borne*. 6 N. Y. Leg. Obs. 401, *Livingstone v. Propeller Express*.

As to the proceedings in a libel for collision, all interested as owners, or otherwise, may join originally in the proceedings; or be admitted subsequently as parties by petition to the court, at its discretion, or for cause; or the master, in the name and on behalf of those interested, may institute proceedings *in rem*, by one suit in admiralty, requiring only one plea, trial, and decree, to determine the whole question of damage; thus effectually avoiding that needless circuitry of numerous actions, which the common law renders indispensable.

It has been determined that an arrested ship may be delivered on bail; 1 Gall. 145, *Alligator*; and that the testimony of persons on board is admissible *ex necessitate* as evidence at the trial, even though such persons may be interested in the result. 1 Sum. 329, *The Boston*; *ibid.* 400, *The Henry Ewbank*; and 1 Dod. 345, *The Charlotte Caroline*. But see the act of July 2, 1862, passed by Congress, to which reference will again be made in a subsequent part of this treatise.

By the act of Congress of August 23, 1842, ch. 188, authority was given to the Supreme Court of the United States to frame and establish rules and regulations gov-

erning causes of admiralty and maritime jurisdiction; and under and in pursuance of that act, the court adopted, in 1844, a code of rules in admiralty numbering, in all, forty-seven; of which rules the twelfth, eighteenth, and perhaps others, have subsequently been modified or abrogated in part. But the fifteenth is as follows: —

“In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone *in personam*.”

This rule remains unmodified, and as it was originally prepared. It is understood that these admiralty rules were drawn up by Mr. Justice Story, and also that the act of February 26, 1845, was originally prepared by him.

Under the fifteenth rule, and the general principles of maritime jurisprudence applicable to cases of collision, the customary allegations in the libel (and they are not only formal but may become quite material) which are deemed necessary to give to the court jurisdiction, are —

1. The locality of the injured vessel, her destination, tonnage, rig, provision in tackle, apparel and furniture, condition as to soundness, and complement of hands as a crew to navigate.

2. Her time of departure, being so manned, etc., arrival, mooring, watch, and warning to colliding vessel; sufficiency of tide, sea-room, and ability of vessel in fault to avoid; her own helplessness and vigilance of the plaintiff ship; carelessness of the respondent ship; forcible collision, its effect, injury by fouling and estimated damage.

3. That damage would not have happened without want of care.

4. That the injured and complaining ship was tight, stanch and strong; that the libellants are the true and lawful owners of the libelling ship, her tackle, apparel and furniture.

5. After the collision and damage, pilots and others remoored or secured; shipwrights and others repaired the damaged ship, at a specified or estimated value of \$; whereby libellants have sustained a damage for services and repairs amounting to \$.

6. Offering to verify, if denied, the foregoing allegations; craving leave to refer to depositions and other proofs to be exhibited in the cause.

These allegations are to be signed by the libellants and sworn to before the District Court, its clerk, or a commissioner.

And the foregoing are the ordinary formal allegations in collision cases, and are sufficient to present an issue for hearing by the court, in behalf of the libellant.

The usual defensive allegations by the libellee, or claimants, or other parties intervening, are —

1. The ownership, tonnage, and present locality of the libelled vessel.

2. Admitting such articles in the libel as are true, and propounding others which deny, qualify, or contradict those in the libel.

3. Stating and alleging a series of defensive articles, importing justification of the libellee and want thereof in libellant.

4. Proffering a verification generally, if denied; and craving leave to exhibit depositions and other proofs; and —

5. Praying the court to pronounce against the libel,

condemn the libellant in costs, and otherwise right and justice to administer in the premises.

The answer is to be signed and sworn to in like manner as the libel.

And since the extension of admiralty jurisdiction to the lakes and other great inland waters, there should be further allegations; as that proper lights and signals were duly displayed, and competent lookouts or watch were upon deck and properly stationed, as far forward as possible, and finally with an officer, on deck and in command, entirely competent to the duties of his station, *vide* ch. 69, 1864; ch. 234, 1866; and ch. 83, 1867, United States.

These additional allegations seem to be required by act of the United States Congress, August 30, 1852, ch. 106, and decisions of the United States Supreme Court since its passage; especially in the cases arising on Lakes Erie, Michigan, and Ontario, and St. Lawrence River, where proceedings in admiralty for collision and such torts were first commenced in the district courts of the western circuits and Northern New York, or the other circuits already referred to. The cases alluded to are the Steamer Louisiana, Propeller Niagara, and Propeller Atlantic, cases in 21 Howard, and other subsequent decisions of the United States Supreme Court, as reported in Howard, Black, or Wallace.

With the appropriate allegations to promote or defend a libel filed, the next matter to be attended to will be the exhibit of the respective proofs by the parties.

In order to recover, the libellant should be proved to have been in the exercise of ordinary care, and the libellee to have been in want of it; and if this be

otherwise, the libellant cannot recover; but both parties may be adjudged blamable, and several cases of this description will be cited from the latest reports.

The contest in collision cases, ordinarily, turns upon the proofs; the rules of law applicable being generally few, but clear, and well understood.

Lord Stowell has stated these rules, generally as coming under four heads in the case of *The Woodrop Sims*, 2 Dods. 83. From the brevity and accuracy of his statement of the rules, the case itself has been as much cited in collision cases as perhaps any other known adjudication. He says: "There are four possibilities under which an accident of this sort may occur. In the *first place*, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*. In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. *Secondly*, a misfortune of this kind may arise when both parties are to blame; as where there has been a want of due diligence or of skill on both sides. In such a case the rule of law is, that the loss must be apportioned between them; as having been occasioned by the fault of both of them. *Thirdly*, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. *Lastly*, it may have been the fault of the ship which ran the other down; and in this case, the injured party would be entitled to an entire compensation from the other, but not exceeding the value of the offending ship and cargo."

The *Trinity Masters* considered the *Woodrop Sims* to blame, in running down the brig *Industry*, because

the Sims had the wind free and ought to have got out of the way ; and so it was decreed.

Besides, the Masters of Trinity House in England and experts in the United States, when called upon to aid the Admiralty Court, have also their established rules. Those of the Trinity Masters, adopted in 1840, are recognized and substantially adopted in the United States.

1. That those ships having the wind fair shall "give way" to those on the wind.

2. That when both are going by the wind, the vessel on the starboard tack shall keep her wind ; and the one on the larboard tack bear up ; thereby passing each other on the larboard hand.

3. That when both vessels have the wind free, large, or a-beam, and meet, they shall pass each other in the same way, on the larboard hand, by putting the helm to port. Steam vessels are considered in the light of sailing vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack.

RULE FOR STEAM VESSELS.

When steamers meet on different tacks or course, and there is danger, if their course is continued, of collision, each vessel shall put her helm to port.

ADDITIONAL PROPOSED RULE.

A vessel coming up with another should pass her to leeward.

After the proofs are all exhibited, then the District Court, in the first instance, proceeds to pass upon the law and facts and give judgment. If the evidence be in writing, and the parties feel aggrieved, either or both may claim an appeal to the Circuit Court ; if one

party appeals, both ought to claim an appeal, as the better practice; and from the decision of the circuit judge, the case, by writ of error or appeal, may be carried to the Supreme Court at Washington, and there definitively determined.

In addition to the Trinity rules, heretofore inserted in the text of this treatise, the increased application of the agency of steam in propelling vessels, has caused other and more stringent rules to be adopted, and the numerous cases in England and this country authorize the statement of them to be substantially as follows:—

Steam vessels must take all possible care to run clear of sailing vessels. A steamer passing, in a narrow channel, either a steam or sailing vessel, must so pass, as to leave the one to be passed on the larboard hand; whether she is meeting, or overtaking and passing, the other.

Two steam vessels being so near as to risk collision, both must port the helm, so as to pass each other on the larboard side. "Port the helm" means larboard in contradistinction to starboard; and is so used to avoid confusion in giving orders.

With these rules and such others as the growth of commerce may gradually render necessary to protect navigation and prevent marine torts and losses by collision, the practitioner has but the twofold duty to perform, of stating the law clearly; arranging his proofs lucidly; and then submit for decision the cause and his client's interest.

In *The Clement*, 2 Curt. 368, there is a clear statement given of the rules of navigation by the learned jurist then presiding in the first circuit.

Collision may properly be defined to be either one

vessel running foul of another, or two vessels running foul of each other.

Though losses by collision have recently produced much discussion, and many decisions, still, in reality, but little conflict is discoverable in those decisions or among the numerous writers on maritime law, who have incidentally discussed this species of marine loss and damage. Emerigon, Valin, Pardessus, and Boulay Paty, in marine affairs, are much referred to as well as the other writers noticed in the first chapter. The Roman law has become antiquated in its rule as to apportionment; differing entirely from that adopted in more modern times by other nations of Europe and particularly by Holland and England; which, in this respect, are in harmony with the United States.

Indeed the most important rules are now well understood and correctly practiced upon in modern courts of admiralty; and the chief difficulty lies in reaching by the means of evidence the real source, origin, and cause of collision. If it happen at sea, on a dark night, or in a severe storm, much agitation, excitement, and consequent confusion would necessarily attend it; and so the evidence, derived from opposite sources, would naturally partake of the character of the scene; and thus the real cause would be inscrutable and might remain undiscoverable.

If, on the other hand, the collision should happen in clear weather, in the day-time, in harbor, or in rivers navigable from the sea, or on any of the big lakes or other inland waters of the United States, then the evidence would be plain and the facts so clear that they would unerringly point to the blamable source and responsible cause of the disaster.

If the party sued be in fault, or if it should appear that the collision was in consequence of his want of skill, care, knowledge, or prudence, then would he be deemed liable for damages.

What is reasonable care depends very much upon the surrounding circumstances and the precise situation of the navigators. But there should always exist a common obligation between the parties to make every reasonable effort to avoid danger and a common responsibility in case of neglect. 6 N. Y. Leg. Obs. 401, *Livingston v. Steam Towboat Express*.

If the libellant is so in fault that he or his agent substantially contributed to the injury, he cannot recover; nevertheless he may be only so in fault to a certain limited extent; but yet not to such extent as would prevent his recovering. 9 Car. & P. 613, *Raisin v. Mitchel*; 3 Mees. & Wels. 244, *Bridge v. Grand Junction Railway Co.*; 11 East, 60, *Butterfield v. Forrester*; 38 E. C. L. Rep. 254, note; 9 Car. & P. 601, *Sills v. Brown*.

By whose fault the collision was occasioned is a question of fact for a jury. 1 How. 28, *Smith v. Condry*.

Where the collision arose *vi majeure*, without the fault or negligence of any one, open or concealed, the owners of the ship and cargo must bear their own loss; and it is not, in any form, a subject of apportionment, contribution, or general average.

Where it resulted from error, inattention, want of sufficient precaution and proper care, and the blame is inscrutable, undiscoverable, or equally imputable to both parties, then is presented a question which to courts is most embarrassing; and the marine law, then, appor-

tions the loss, by a sort of *judicium rusticum*, or, as Kent terms it, *judicium rusticorum*; and so it is held by the foreign ordinances and the jurists of Continental Europe. But this rule is not adopted in England; nor is it recognized or accepted in the United States to its full extent.

It may possibly be better stated in the language of the courts, by a brief notice and review of the American decisions on collision, which shall now be given.

Some annotators have said, that there had been no limitation imposed by legislative enactment to the liability of ship-owners for the misconduct of their masters and mariners; and so it appeared to have been determined in *Walter v. Brewer*, 11 Mass. 99, in the year 1814; or perhaps the limit of liability was left indefinite and uncertain; so much so, indeed, that the Legislature of Massachusetts, in 1819, February 20, interposed and passed an act expressly limiting such liability of owners of ships, for the sake of encouraging trade and commerce, to the value of the ship and freight; and also considered the charterer as the owner, provided such charterer should man, victual, and navigate the vessel, at his own expense. See Mass. Stat. 1818, ch. 122.

This limitation on the liability of the owner had been formerly coextensive with the amount of loss; and it, accordingly, became thenceforward restricted to the value of the property at hazard, as already appears in a former part of this chapter.

Though this privileged protection is extended to owners for acts of embezzling, it does not however seem to apply in cases of collision. 14 Gray, 301, *Walker v. Boston and Hope Insurance Company*; 3 Story, R. 492, *Pope v. Nickerson*.

In England, also, similar restricting acts have been passed, as will appear by referring to 26 Geo. III. chs. 86 and 159; and finally, 17 & 18 Vict. ch. 104, § 503; which latter enactment assimilates the statutes of England very much to the acts of Congress; thereby placing the English and American courts almost precisely on the same footing, as to limited liability of owners.

Having already referred to 1st Sprague's Decisions, and many adjudications of the Supreme Court of the United States, such as *The Genesee Chief*, *Fretz et al. v. Bull et al.*, *Walsh v. Rogers*, *Smith v. Condry*, *The Propeller Monticello*, *Steamer Oregon v. Rocca*, and *New York v. Rea*, and others; it only remains to add for reference the more recent decisions of our highest tribunal and other cases which have been adjudicated in the district and circuit courts.

In 19 Howard, there are three cases: *Ure v. Coffman*, p. 56; *United States v. Steamer St. Charles*, p. 108; and *New York and Virginia Steamship Company v. Calderwood*, p. 241.

In 20 Howard, 296, *Jackson v. Steamer Magnolio*, which was a cause of collision and much considered. *Ibid.* p. 543, is the case of *Snow et al. v. Hill*, which was a collision by towed steamers.

In 21 Howard, are two cases of collision, appropriate to be read by the student: *The Steamer Lawrence v. Fisher et al.*, p. 1; and *The New York and Liverpool Mail Steamship Company v. Rumbull*, p. 372. This last was a collision between a sailing and steam-vessel; and the opinion of the court was delivered by Mr. Justice Clifford. There is also the case of *Chamberlain v. Ward*, which was a collision on Lake Erie,

where the fault was mutual and the damages apportioned. *Vide* 21 How. 548.

In 22 Howard, are reported two cases of collision, one occurring on the Yazoo River, the other on the Delaware: 22 How. 48, *Nelson v. Leland*; *ibid.* 461, *New York and Baltimore Transportation Company v. Philadelphia and Savannah Steam Company*.

In 23 Howard, are to be found also two cases of collision, both occurring in the Chesapeake Bay: the one on p. 287, *Haney v. Baltimore Steam Packet Company*, in which Grier, J., gave the opinion of the court; the other on p. 448, *Mitredge v. Dill*, where also the opinion of the court was given by Mr. Justice Clifford.

In 24 Howard, are reported three cases of collision, severally occurring on the East, Ohio, and Elizabeth rivers: *Sturgis v. Boyer*, 24 How. 110; *Pearce v. Page*, *ibid.* 228; and *Union Steam Company v. New York and Virginia Steam Company*, *ibid.* 307; in the first and last, the decisions were pronounced for the court by Clifford, J., and in the second by Mr. Justice McLean.

In 1 Black, 414, *The Marcellus*, is a case of collision in the harbor of Boston; and again the opinion was delivered by Mr. Justice Clifford; also 1 Black, 574, *Propeller Commerce*, another case of collision, occurring on the Hudson River; and in that also an opinion is delivered by Clifford, J.

In Gallison, Mason, Sumner, Ware, Davis, Abbott, Dallas, Cranch, Howland, Howland and Blatchford, Crabbe, Gilpin, Newberry, Stuart, Bee, and Peters, Jr., the more important decisions there reported are familiar to the profession, and do not materially vary the doctrines already laid down in the text.

A French rule requires that one vessel, following another, on entering a port before they come to anchor, shall avoid or steer clear of the vessel ahead ; and this, whether the two are sailing or steam vessels. In this rule there is practical good sense, and, if adopted, would doubtless be readily acquiesced in, as sound law and sense ; and as a rule useful to prevent collisions.

When a vessel is at anchor, near a channel much frequented by other vessels, she ought to display signal lights in the night-time ; and even when riding at anchor in the harbor, on a dark night, there should be, at least, a look-out or deck watch ; or perhaps, more properly, an anchor watch. *O'Neil v. Sears*, 24 Law Rep. 731, by Sprague, J. ; and see *S. C.* reported in 2 Sprague, p. 52.

In 1840, August 7, was passed an act by the British Parliament to improve the practice and extend the jurisdiction of the High Court of Admiralty ; authorizing, by § 18, the admiralty judge to make rules and regulations for proceedings in admiralty ; also providing that the Dean of the Arches Court should sit as admiralty judge in his absence ; and that advocates, surrogates and proctors in the Arches should also practice in the Admiralty Court. The act consists of twenty-four sections and is cited as that of 3 & 4 Vict. ch. 65.

The act of August 7, 1854 (17 & 18 Vict. ch. 78), enabled the Admiralty Court to appoint commissioners and substitute stamps for fees.

That of August 8, 1859, obliterated all distinctions between the practitioners in the various courts ; enabling sergeants, barristers, attorneys and solicitors to practice in the admiralty courts ; the sergeants and barristers as advocates, and the attorneys and solicitors as proctors.

On July 3, 1854, the judge of admiralty (the Hon. Stephen Lushington) passed rules as authorized by the act of 1840, § 18.

December 12, 1854, the same magistrate certified certain rules as to fees, stamps, etc., as having been adopted by her Majesty's Privy Council, under what is termed the "Admiralty Court Act," 1854, and cited as the 17 & 18 Vict. ch. 78.

On the 1st December, 1855, the same judge adopted a set of rules, orders and regulations in regard to instance proceedings; which were sanctioned by the Privy Council December 7, 1855; also, after the 1st of January 1856, proceedings were specially directed to be printed by his order.

In 1859, other rules were framed by Dr. Lushington, more full and complete; and these were approved by the council November 29, 1859; the same to take effect January 1, 1860; with tables for fees, and forms covering all customary proceedings in the English admiralty. There are in all one hundred and eighty-seven sections. And so appropriate to the subject of this chapter is § 62, that it is here cited in full.

"Sect. 62. In causes of damages, unless the judge shall otherwise order, each proctor shall, before any pleading is given in, file a document, to be called a preliminary act, forms of which may be obtained in the registry, containing a statement of the following particulars:—

"1. The name of the vessels which came into collision and the names of their masters.

"2. The time of collision.

"3. The place of collision.

"4. The direction of the wind.

" 5. The state of the weather.

" 6. The state and force of the tide.

" 7. The course and speed of the one vessel when the other was first seen."

" 8. The lights, if any, carried by her.

" 9. The distance and bearing of the other vessel when first seen.

" 10. The lights, if any, of the other vessel which were first seen.

" 11. Whether any lights of the other vessel, other than those first seen, came into view before the collision.

" 12. What measures were taken, and when, to avoid the collision.

" 13. The parts of each vessel which first came in contact."

And this document, inclosing these preliminary acts, shall be sealed up, and only opened by order of the judge, after the proofs are filed; unless otherwise agreed by the proctors and sanctioned by the judge.

Since, in collision cases, the controversy is usually one of fact; that is, which party is culpably in fault, and the evidence procurable may be conflicting, as it usually must be, and so the real occasion or cause of collision may be thereby rendered uncertain or even inscrutable, the rule, adopted by Dr. Lushington in 1859, above cited, may be suggestive to any official desiring to secure the rights of innocent parties against offending or wrong-doing parties. At this present writing (January 12, 1863), the author has observed a movement in the United States Congress to provide additional rules to prevent maritime collisions — and it is not inopportune. *Vide* Appendix F.

The commerce of the world is constantly increasing,

as well as the amount of tonnage invested in ships. Almost every day adds another sailing or steam sea-going vessel to our navy or merchant marine; our lakes and inland waters and rivers are being incessantly traversed by vessels propelled by wind or steam. The danger of damage, therefore, from collision, is becoming gradually greater and the security against danger less. It is proper, then, that all in public station should exercise the utmost vigilance in providing the necessary preventive measures to protect the mercantile and shipping interest in this respect. *Vide* United States Laws, ch. 59, 1864.

A strict compliance with the recognized rules of navigation should be generally enforced; and if it be found, by experience, that additional rules are needful, they should, by competent authority, at once become a part of the laws of the sea. If existing rules are found imperfect or inadequate, to effect the security designed to commerce, then they should be modified accordingly.

Whether the American courts have rules sufficient to meet the marine exigencies of the times or not, it is, at all events, quite clear, that, in this respect, England is somewhat in advance of the United States in framing special rules for signal lights and requiring the use of horns, bells, and steam whistles for fog signals, and the exhibition of white lights, between sunrise and sunset, by sea-going vessels when at anchor in roadsteads and fairways. But *vide* Appendix G.

There are some existing rules of navigation which ought not always, however, to be strictly complied with, nor, under all circumstances, rigidly enforced. Something, after all, must necessarily be left to the nautical judgment and caution of a skillful navigator, to act as circumstances may require.

Thus, when vessels meet on different tacks, and there is danger of collision by continuing their respective courses, the rule is that one shall port her helm. This is well generally, but not invariably prudent: for suppose the vessels to meet in a fog, and are almost aboard of each other, before their presence or proximity is known; if both port their helm, they may strike right dead ahead, and not only collision but inevitable destruction to both may be the consequence. Whereas, if one should luff or go in stays and the other bear away or wear, a collision may thereby be avoided. In this condition, it may be essential, to avoid collision, that the vessel that luffs should come right up in the wind's eye, until the helmsman, who "cuns the ship," sees the sails shivering in the wind. Some discretion is vital to good nautical management.

Many other cases may be supposed, where a strict literal compliance with any specific prescribed rules would result in disaster; and yet some skillful manœuvre in the management of the ship by a cool, collected and prudent navigator, if permitted to exercise his nautical skill, might avoid both disaster and danger even. The law, therefore, very properly confides much to the discretion of experienced ship-masters as well as skillful pilots. 1 Sprague, 221.

Hence the importance of calling upon the aid of Trinity Masters by the court or nautical assessors, by the committee of the Privy Council in England, and experienced and expert seamen in this country, to assist the courts in weighing the evidence, and enabling them to lay the blame, in cases of collision, where it rightfully belongs.

In 1 Sprague, 219, it was declared to be the established

rule to divide the damage, where both parties were in fault, negligent, or otherwise blamable. *Allen et al. v. Mackay et al.*: and generally in such cases the costs will be divided also. Yet, in *The London*, *Browning and Lush*. 82, the court held and will occasionally exercise a discretionary power to condemn the plaintiff in costs.

Several recent cases of collision, where both were to blame, are collected and here cited for the convenience of the student. *The Steamboat Boston*, *Olc.* 407; *Brig Rival*, 1 *Sprague*, 128; *Lennox v. Winnisimmet Co.*, *ibid.* 160; 2 *Sprague*, 17, *Marcia Trebon*; *ibid.* 52, *O'Neil v. Sears*; 1 *Spinks*, 91, *Carron*; *ibid.* 96, *Aliwell*; *ibid.* 269, *Wansfell*; *Swabey*, 28, *Calypso*; *ibid.* 55, *James*; *ibid.* 306, *Lind*; and in *Lush*. 388, *Milan*; *Brown. and Lush.* 287, *Great Eastern*; also two cases of inevitable accident, *The Peerless*, *Lush*. 30, and *The London*, *Brown. and Lush.* 82.

The Catalina, 2 *Spinks*, 23. A Dutch and Spanish vessel came into collision. The Spanish crew boarded the other vessel, and behaved with great violence. The court deemed the Dutch vessel to blame for the collision, and pronounced for the Spaniard; but gave no costs, on account of the subsequent misconduct of the Spanish crew; thus reserving, as in *The London*, *Brown. and Lush.* 82, a discretionary power to award or withhold costs, *in poenam*, as may be required.

Several other cases may be found in *Brown. and Lushington* of general importance: as *The Europa*, p. 89, where it was held, that a maritime lien may be lost by lapse of time and laches. In *The Faulkland and Navigator*, p. 204, it was held that wearing was unusual without good cause, and a vessel, sailing on the wind, should tack, and not wear without sufficient sea-room.

CHAPTER V.

SALVAGE.

SALVAGE is a claim for compensation, or rather a reward for services substantially and essentially maritime, voluntarily rendered, and resulting in success. So that salvage services are characterized by three qualities or ingredients, as attending them, which must distinguish them intrinsically from other labor or service. Technically such services, therefore, must be maritime, voluntary, and successful.

When a suit for a claim of this kind is promoted in admiralty, the proceedings should be commenced, according to the directions to be found in the nineteenth rule of the "Rules of Practice in Admiralty," as adopted by the United States Supreme Court in 1845. That rule is as follows:—

"In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof; or *in personam*, against the party at whose request and for whose benefit the salvage service has been performed."

Formerly, the master, in his own name, but in behalf of himself, owners, mariners, and all known to be interested in the salvage claim, instituted proceedings *in rem* against the salvaged property; and afterward others, for cause, might become parties by petition to the court, before any final decree had been made.

But the proper course, in promoting, in the admiralty, a libel for salvage is, to insert all the salvor's names as libellants, with approximate allegations of their respective interests and claims; and should any persons entitled to share as salvors be omitted, they can, by petition to the court, be admitted to become parties, in any stage of the subsequent proceedings, at the discretion of the court.

The cases of *The Boston*, 1 Sumner, 328, and *The Henry Ewbank*, ibid. 400, heard and determined by Mr. Justice Story, are leading American cases upon salvage, and much cited and relied upon.

Tender of salvage, before trial, is not too frequently practiced; but yet may always be judicious. Tenders are ordinarily disregarded by the admiralty courts of England, unless made by formal acts of the court. 2 Wm. Rob. 9, *The Hope*.

Propositions to settle by compromise are often expressed in equivocal terms; and, consequently, are calculated to mislead; or liable to be misapprehended by the parties. 1 Lush. 13, *The John*.

But where a sufficient tender has been made; is well understood, and yet has not been accepted; salvors would not be entitled to costs. 4 C. Rob. 103, *Vrow Margaretta*; Abbot on Shipping, 403; 1 Hagg. 157, *The John and Thomas*; Swab. 256, *The Mobile*; 1 Lush. 454, *Compte Nesselrode*; 1 Newb. 329, *The Charles*; 6 Notes of Cases, 290, *The Johannes*; 1 Spinks, 171, *The Batavia*; 2 Spinks, 252, *The Hopewell*; but *vide* Brown. and Lush. 82, *The London*.

When a tender has not been seasonably accepted, the court may reduce it. 2 Hagg. 18, *The General Palmer*.

What portion of the proceeds of the property saved

shall be awarded to the salvors depends upon the hazard incurred; the merit and success of the service, rendered; and, in some measure upon the amount of value and the property saved.

In the case of *The Thetis* (2 Knapp, P. C. 390), decided in 1834 by the judicial committee of the Privy Council, and the opinion delivered by the then vice-chancellor (Sir Lancelot Shadwell), one third of the amount of the salvaged property was awarded to the salvors. There the claimants recovered, by great exertions, treasure from a wreck, derelict and sunk under water near Rio Janerio. Sir Thomas Parker, the rear admiral in command of the naval station where the disaster occurred to the *Thetis*, commenced operations for recovery with the diving-bell and other apparatus, and thereby recovered \$750,000 out of about \$820,000 in bullion, which was the amount on board of the wrecked vessel when lost. To the admiral was awarded one eighth; and to the admiralty, repayment for the pay, victualling, and wear and tear of the king's ship. Also *vide* 3 Hagg. 14, S. C.

The amount awarded is discretionary with the court as a general rule. *Vide* *The Dos Hermanos*, 10 Wheat. 306, and 1 Gall. 133, *Tyson v. Prior*.

In derelict cases, the salvage awarded is seldom under two fifths; generally one half, and rarely less. The American and English decisions in this respect are in harmony; the leading cases are, in the United States, *Talbot v. Leeman*, 1 Cranch, 1; *The Harmony*, 1 Pet. Adm. 70. The former was a case of recapture of the salvor's own vessel; the latter of the vessel of another. The ground upon which the service is deemed meritorious to the recapturer is the legality of the original

capture. If there were probable cause for it, then the capture is to be considered hostile, and so lawful. If not, then it was unlawful; and the captors would be liable for damages and costs to the claimants.

In *The Adeline* (9 Cranch, 244), one sixth was allowed for salvage claim; in *The Adventure* (8 Cranch, 221), one half; in *Bond v. Brig Cora* (2 Wash. C. C. 80), one third was allowed; in *The Blaireau* (2 Cranch, 440), one third for the salvors and one third for the owners; in *Hobart v. Drogan* (10 Pet. 108), one third; in *Rowe v. nameless Brig* (1 Mason, 372), one half was stated to be the general rule, but that the rule is flexible; in *The Emulous* (1 Sum. 270), it was one seventh; in *The Messenger* (2 Pet. Adm. 284), one third; in the *5 Negroes*, (Bee, 201), one tenth; in the *194 Slaves* (Bee, 226), one fifth; in *The Friendship* (Bee, 175), salvage for money saved was adjudged to be from one fifth to one tenth of the amount saved; in *140 Barrels Flour* (2 Story, 195), and *The Elizabeth and Jane* (Ware, 35), one half was considered proper award in cases of derelict, and this allowance might be enlarged at the discretion of the court; and so, of course, while it now remains discretionary with the court, may the allowance be diminished. In *Smith v. Stewart* (Crabbe, 218), Judge Hopkinson thought the rule to be generally the more trouble the more salvage; in *The A. D. Patchin*, 1 Blatch. 414, the court deemed a written agreement not binding, yet, if fairly made, it would be of weight in fixing the amount to be awarded on salvage principles; in *Sturgis v. Law* (3 Sand. 651), salvage, by long custom, was considered as belonging to the admiralty, and not the common law courts; nothing was deemed due for saving life in *The Emblem* (Davies, 61), yet that even

loss of life the court will consider in fixing the amount of salvage; this doctrine is in conflict somewhat with recent English decisions and acts of Parliament; so that the conclusion from these cases and references is, that the amount to be awarded to salvors for meritorious maritime services, voluntarily rendered and resulting in success, varies from one half to one tenth of the value of the property saved; and, in cases of derelict, may be enlarged even beyond the one half.

The shipper is not entitled to salvage unless he consent to a division of the salvaged effects. 3 Sum. 543, *The Nathaniel Hooper*.

The finder in derelict acquires a right against the owner and consequent lien for his salvage claim, on the salvaged property. *The Bee, Ware*, 332.

In *The Emblem*, it was considered that if the owners abandon on the institution of proceedings *in rem*, the salvors were without any claim *in personam* against the owners.

In 1 Story, 314, 340 Pigs of Copper, liberal allowance of salvage is deemed good policy.

In *The Etna* (*Ware*, 462), a minor's share was considered his own property, even where the suit was in the father's name as *prochein ami*; and if the father should assume privately to settle the claim without the son's knowledge and consent, and give a receipt in full, it would be set aside, and full wages decreed to the son, notwithstanding the parent's receipt.

In *The Henry Ewbank* (1 Sum. 400), a salvor permitted a claim of others, who were co-salvors, to be promoted and a decree pronounced, before he applied to the court for his share of the salvage to be awarded; yet, upon petition, he was admitted as a party; and

compensation was decreed for his claim to be paid out of the proceeds then in court.

Without reviewing the English and American decisions, at present, I shall proceed to notice the questions usually mooted on the trial of salvage cases; and this is possibly the more direct and sure way of turning the attention of the student to those principles of jurisprudence, which underlie and are chiefly applicable to a salvage service and its incidents.

There are four inquiries appropriate to be made in discussing a salvage claim:

1. What constitutes a salvage service?
2. Who are salvors?
3. What compensation shall salvors have?
4. Has there been any cause for forfeiture?

Salvage service may be defined to be the saving from probable loss a ship or her cargo, when in imminent peril; or recovering the one or the other, after actual loss or abandonment, *sine spe recuperandi vel animo revertendi*. Abbott on Shipping, 659. .

Persons performing such service (and it must be an essentially maritime service) become salvors, in contemplation and by implication of law, and therefore are entitled to compensation for the service so rendered, unless by some misconduct on their part, they shall have forfeited their claim for salvage.

Embezzlement, negligence, fraud, spoliation, dishonesty, or indeed any misconduct on the part of salvors, is sufficient ground for forfeiture; and persons guilty of any such misconduct, forfeit their salvage, wholly or in part; if it be in part only, then it may be presumed that the forfeiture was imposed or inflicted by the court *in pœnam*.

The remuneration, when any is awarded for salvage services, generally varies from one quarter to one half of the salvaged property; or more, in derelict, at the court's discretion, may be awarded.

Salvage services, rendered or tendered spontaneously by the persons performing it, must be essentially maritime in its nature; and not necessarily originating in any mutual agreement; nor is it dependent upon any express contract previously entered into by the salvors. Whenever useful salvage service has been actually rendered, the law implies that the salvor is entitled to compensation or reward, to be allowed at the discretion of the judge of an admiralty court. Indeed, all prior stipulations are superfluous and disregarded in admiralty; having no binding force and effect whatever, unless it be as a guide or standard to fix the amount of salvage to be awarded. If a claimant has paused before the service, to stipulate for remuneration, his claim for salvage would, for that reason, be subjected to suspicion, as to whether it had been voluntarily rendered; and would accordingly be more rigidly scrutinized by the admiralty judge.

Certainly the claim is no stronger because the salvor, promoting it, may have cautiously made a previous agreement; and perhaps it ought not to be deemed, for that reason only, any weaker; especially where beneficial and meritorious service had been actually rendered.

The essence of this claim is, that it is for a service in its nature substantially maritime, freely and willingly performed, and not done from a sense of duty, but resulting successfully.

By disaster, a loss occurs; and timely aid steps in

and recovers the otherwise lost property ; or it may be that property is in imminent peril and danger of being lost, and human enterprise, daring, or nautical skill interposes and saves it from actual loss ; in all such cases, the service rendered, when voluntary and successful, is what may be denominated legal salvage service ; and if the service be strictly maritime, or even substantially so, the person performing such service, is, in contemplation of law, a salvor ; and as such becomes, with or without contract or previous stipulation, legally entitled to compensation or salvage reward.

Thus stated, the doctrine derived from all ancient codes of maritime jurisprudence and modern legislation, as affecting claims for salvage, necessarily prevents and excludes, as a general rule, all those persons from claiming as salvors, whose duty, arising from situation, contract, or otherwise, it is to exert themselves to the utmost to save from peril or rescue from loss, while present, either an endangered ship or her loading.

For instance, the master, officers, and seamen of a vessel cannot properly become salvors and be entitled to a claim for salvage, unless it shall be made, at the same time, to appear in admiralty that they have rendered extraordinary services ; and, by their personal exertions, have gone quite beyond the appropriate line of their duty as master, officers, and seamen. *The Blaireau*, 2 Cranch, 240 ; *Hobart et al. v. Droган et al.* 10 Pet. 108 ; *The Neptune*, 1 Hagg. 237 ; *The Florence*, 20 Eng. L. & Eq. 516 ; and *The Warrior*, Lush. 476.

Passengers, as a general rule, cannot ordinarily be deemed salvors, and as such become entitled to salvage recompense, inasmuch as there is a duty incumbent upon all on board a vessel in imminent danger, to

exert themselves to their utmost ability, to save the ship, and thereby contribute to their own as well as the security of others. This duty, as well as the danger, is alike common to all on board of the imperilled ship. *Park on Insurance*, 303 ; *McGinnis v. The Steamer Pontiac*, Newb. 130, and *S. C. 5 McLean*, 359.

Nevertheless, where a passenger shall have departed from his own sphere and transcended altogether his appropriate line of duty, and, by conspicuous ability, nautical skill, and personal effort, enterprise, or daring superadded, shall have contributed to save or rescue an endangered ship or lost cargo ; or has been otherwise instrumental in so doing ; even a passenger may thus become in law a salvor, and entitled to salvage compensation. The earlier leading cases are those of *Newman v. Walters*, 3 Bos. & Pul. 612, and *The Two Friends*, 1 Rob. 271.

The Two Friends was the case of an American ship, taken by the French and afterwards recaptured by the crew. The rescue was to the advantage of the owners, and the underwriters signally approved the service by voluntarily giving to the master the very handsome reward of £1,250. But the owners intervened in the libel by a passenger, and a question of jurisdiction was raised and argued ; but it was overruled by Sir W. Scott.

Some of the crew were British subjects ; one on board, a Mr. Miller, was deemed a passenger, but rendered valuable service. He paid £270, to buy over some Danish sailors on board the French ship, and was "very instrumental in effecting the rescue."

To the sailors, American and others, the court awarded £300 each.

To Miller, the passenger, the same sum as the under-

writers had paid the master (£1,250), with the addition of £270 paid by him to gain over the Danes, and £50 more for personal expenses.

The case of *Newman v. Walters* was heard and determined in the Common Pleas Court. Substantially it was a vessel derelict by wreck and not at sea. The facts are fit to be made accessible to the student of admiralty law; and the principles there enunciated by Lord Alvanley, C. J., and his associates, Messrs. Justices Heath and Rooke, should become familiar to all practitioners, as they have given tone and character to all subsequent adjudications, touching especially the obligations, rights, privileges, and legal *status* generally of the passenger on board ship, in time of peril, arising from wreck, violence of the elements, abandonment by crew, or capture by enemies. The case was decided in 1804; and the general facts were as follows. The Ship *Betsey*, a British ship, struck and stranded on the *Chichester Shoals*. Her captain and three of her crew escaped in the pinnace. The pilot in charge was drunk. The plaintiff was but a passenger; as the case finds, "a free passenger from Gravesend to Saint Kitts;" as such, he was at liberty to quit at pleasure or stay by the ship; it was his right, and he might have gone ashore in the pinnace with the deserting master. But he was urged by the mate and rest of the crew to remain and take charge. He had seen service in the merchant marine as master-mariner, was, therefore, experienced as a navigator, and yielded to the urgent request of those who remained by the ship. He was not, as a passenger, obliged so to do. On his part, it was accordingly optional; and his remaining was a voluntary act, whereby he did more than was required of him in his

situation and capacity of passenger on board ship. His detention, then, was equivalent to a retainer by the only agents of the owners present, after the actual master had escaped in the pinnace.

When the plaintiff first took command, the pilot was about to let go the anchor, an act by which the ship would probably have been irrecoverably lost. But the plaintiff, Newman, interfered and prevented this error; thus summarily displacing the pilot; and afterward safely brought the ship into Ramsgate harbor.

On landing, the owner promptly recognized his conduct; approved all he had done; applauded his efficiency and merit; and, by letter, strongly commended Captain Newman to the liberality of the underwriters: estimating and putting down £200, as the least sum that should be awarded to the plaintiff for his effective services.

The action, which was *indebitatus assumpsit*, was tried before Lord Alvanley, by a jury, who found for the plaintiff a verdict for £400.

A motion was made for a new trial, on two grounds, substantially: 1. No legal salvage. 2. Excessive damages. The motion was argued by Cockell, Bailey, and Best in favor, and Shepherd and Heywood against it.

But the motion, after argument, was refused, and the verdict sustained: the three judges all concurring.

The cases cited and commented upon in argument, were *The Two Friends*, *supra*; *The Joseph Harvey*, 1 Ch. Rob. 306, and *The Beaver*, 3 *ibid.* 292; which together supplemented all the law and authority then applicable to the subject.

The *Beaver* was a case of rescue, by the master and a boy, against five Frenchmen. She was a British ship,

captured by the French. The master knocked down the Frenchman at the helm, took away his pistols, kept the others at bay, and subdued the whole; and, with the boy, aided by a relief crew from a British man-of-war, safely brought his vessel into an English port.

In the Admiralty Court, Sir William Scott awarded the master and boy £1,000 : £850 for master, and £150 for boy; to the twelve seamen from the man-of-war £500 in all.

In *The Joseph Harvey*, the facts found induced Sir W. Scott to pronounce it an "unpardonable effrontery," to claim for them any salvage merit. The principle, however, was there recognized as a sound general rule of maritime jurisprudence, that a service, which should exceed the usual line or limit of positive duty, may be elevated into a service of merit; as that pilotage or towage service may become exalted to the grade and rank of a salvage service, and entitled to extra compensation, as such.

And the same principle is equally applicable, and may rightfully be extended, to agents, passengers, and other persons.

Thus, the actual master, rightfully in command of an endangered ship, may, at a time of extreme peril, be sick or indisposed; and so unable to perform his proper part; or he may, from excessive alarm and agitation, become physically incompetent to discharge his own duty well; or he may, from inexperience or want of the requisite nerve and resolution, prove to be physically unequal to the trying exigency in which he finds himself and his command suddenly involved: under these circumstances, or any of them, if a passenger

of known experience, personal courage, nautical skill, or other desirable qualifications, should assume the command and control of affairs, at others' request or of his own volition, and thereby ultimately through his subsequent suggestions, gallantry, personal efforts, or practical ingenuity, contribute to the saving or rescuing of an imperilled vessel, such passenger ought to be deemed a salvor, and as such become legally entitled to salvage remuneration. In the case supposed, the merit would be so marked, that no admiralty court would, in obedience to any mere technical rule, appear to be justified in withholding compensation. To refuse to reward merit so conspicuous, would be incongruous with the primary principles of admiralty law, ignoring the reason and disregarding the policy and spirit which ought to characterize and pervade its proper administration in courts of admiralty. *Bond v. Brig Cora*, 2 Wash. C. C. 80 ; S. C. 2 Pet. Adm. 361. In this case, both the district and circuit judge recognized judicially, as early as 1806, the merit and claim to salvage service of a Spanish passenger, on board an American vessel, and decreed accordingly.

When, therefore, a mere passenger has voluntarily rendered meritorious service, and effectively contributed to the salving of a ship, endangered or derelict, his service should be adequately rewarded by a remuneration commensurate with its proper value. For when he shall have stepped out of his sphere and gone beyond the appropriate line of his duty, and has voluntarily rendered valuable service, which resulted in success, then he becomes legally as well as morally, well entitled to remuneration from those benefited by the service.

If passengers contribute to the rescue of a vessel by

recapture, their merit as salvors is duly recognized, and should be suitably rewarded. Even female passengers may render meritorious salvage service. Such was the fact in the case of *Clayton et al. v. The Ship Harmony*, 1 Pet. Adm. 70. Mrs. Ann Collett and Miss Esther Collett were passengers in the *Harmony*, an American ship, which was captured by a French corvette, and put in charge of a prize crew of three French officers, with seven other men, and ordered to Rochelle. Two days after the capture, the Americans, seven in number only, including the two ladies, rose and overpowered the French crew, retook the *Harmony*, and brought her into port. The two lady passengers assisted throughout the enterprise; one of them, during the last scene of the enterprise, actually taking the helm: and both evincing throughout a firmness of mind, in the critical situation, which was deemed as honorable to them, as was their humanity in attending to the wounded, after the contest was over. Such service was indeed meritorious; its merit could not fail to be duly appreciated, and it was handsomely recognized by the court: and had these passengers joined in the libel for salvage, a full share of \$3,603.41, would have been judicially decreed to them.

The principle was declared however, by this authority, that even female passengers may be legal salvors; thus further qualifying the old doctrine, that passengers cannot become salvors, though aiding and assisting in salvage service; that being mere matter of duty of a passenger. Also, *vide* 1 Hagg. 194; *The Jane and Matilda*.

But the case of *Hamilton E. Towle v. The Steamer Great Eastern*, 11 L. T. (N. S.) 516, is more recent; and

moreover it is one of singular interest, both for the peculiar merit of the libellant, and the amount of the salvage compensation decreed to him as salvor. In a gale, the steamer's rudder-shaft was broken, and her paddle-wheels disabled. The steamer was herself thrown into the trough of the sea; labored badly; became almost hopelessly unmanageable; and was temporarily utterly helpless. At this juncture, the libellant disclosed a plan of relief, which he had himself conceived; and was permitted, by the master, to cause it, under his superintendence, to be put in execution. By this scheme, which was the application of a newly-devised steering apparatus, extemporized for the occasion, the steamer was relieved from peril, and safely brought into port. For this service, whether it be called advice, suggestion, invention, ingenuity, information, or science illustrated on the ocean by practical mechanics, Mr. Towle sued as salvor, was adjudged to be salvor, and rewarded as such. For this meritorious service the court decreed to the libellant, as salvage, the liberal sum of \$15,000.

The service rendered was extraordinary, proffered at a time of extreme peril, when the ordinary maritime manoeuvres and nautical expedients of seamen present had proved unavailing; the naval engineer and navigators were baffled; but the civil and practical engineer was successful. And therefore upon principle, precedent, and policy, the law commended Mr. Towle's claim to the court's favor.

Thus it has been seen that passengers can justly become salvors; and the old dogma to the contrary, once so restrictive and exclusive, is constantly being relaxed by modern legislation or recent judicial de-

cisions. This rule, like that declaring freight to be the mother of wages, is gradually being extended and becoming more flexible; and like that, it must ultimately yield to the advance of sound jurisprudence and modern civilization, as do other ancient doctrines or technical fictions, which formerly discredited the admiralty law and its administration. In England they are legislated; in the United States, they are adjudicated, out of the maritime law and continued legal existence.

Pilots also may become salvors, in cases of distress; or under peculiar and extraordinary circumstances. Generally, however, their services are strictly professional, and within the line of their ordinary duty. While this is the case, they must as a class be content with the usual pilotage compensation, prescribed by the Pilot Commissioners or the Legislature. But there are occasions when pilotage, like towage service, may be justly exalted into a salvage service. If pilots, in a time of peril or distress, perform unusual maritime service, out of the sphere of their profession and beyond their line of duty, which shall have contributed to the ultimate salving of property imperilled, then it is but right, in admiralty, that they should be classed legally among salvors and rewarded as such. When so remunerated, it is immaterial whether such compensation be denominated *extra* pilotage or salvage. The more rational way of dealing with it, however, would seem to be, to designate it as salvage reward, or salvage in lieu of or in addition to pilotage. Whatever may have been the old rule or former practice, the modern doctrine that a pilot, stepping outside of his profession, and performing voluntarily a service beyond the line of his

professional duty, may be treated judicially as a salvor, is fully sustained by the authorities usually cited and relied upon. *Vide* The City of Edinburgh, 3 Hagg. 333; *Hand v. Elvira*, Gilpin, 60; *Hobart et al. v. Drohan et al.* 10 Pet. 108.

So seamen may, in certain contingencies, become salvors of their own as well as other vessels. While, indeed, under a continuing contract, and in the customary discharge of his stipulated duty, which requires him to do his utmost for the navigation and preservation of his own vessel, to which he owes allegiance, a seaman is not to be deemed capable of acquiring the character of salvor and so entitled to salvage compensation. But when, by a termination of the mariner's contract, practical or theoretical, actual or constructive, a seaman is deserted and left solitary and alone, and with his consent, as Toole in the *Blaireau*, or without his consent, as was Knowlton's case in the *Triumph* (1 Sprague, 428); or where a mariner by his shipmates is abandoned, but with the master's consent or order, at all events, the crew following the master's example, it would seem that a seaman, in such situation, ought not to be excluded from salvage reward, if he shall have really performed a salvage service. The *John Perkins*, in 21 Law Rep. 87; S. C. 19 *ibid.* 99. In all its varied aspects, the Admiralty Court, without a servile devotion to any technical rule, should exercise a sound judicial discretion, in weighing the facts and estimating the value and merit of any service rendered under so perilous a predicament. Toole's service in the *Blaireau*, and Knowlton's in the *Triumph*, was to their own vessel; Nickerson's may possibly have been beneficial to both his own and another's vessel.

And if the court be not prohibited by some express, inflexible, and well-established rule of maritime law, it should generally endeavor to do some justice, as did Judge Ware toward one of the crew of the Wyvern for contributing, accidentally or providentially, to the ultimate safety of the John Perkins, (19 Law Rep.).

Hence the reversal by the Circuit Court of this decree of the District Court has ever seemed to have been made in obedience to a harsh technical rule, and, *ex industria*, to uphold that rule, without qualification. It was followed too closely and adhered to too tenaciously. As it now stands, however, the decision must still be deemed an authority; though not without the possible chance of a reëxamination at least, if not some substantial modification or qualification of the Circuit Court's adjudication or opinion.

For three dismal days, the deserted, if not disheartened seaman, Nickerson, remained in gloomy solitude, by the Wyvern, while embedded in ice, on a bleak coast, unaided by his shipmates and without orders from his commander; during that trying period, he performed acts alleged and once adjudged to have been beneficial to another vessel, the John Perkins. These acts may have saved that other vessel from possible destruction; upon this hypothesis, at any rate, the case was heard and determined. Assuming such to be the fact, might not these acts, like the conduct of Toole and Knowlton, have supplemental merit? If so, they would present a similar claim, in fact and principle, to judicial recognition and appreciation in admiralty. Dr. Lushington concluded that "an abandonment at sea does vacate the contract." In *The Florence*, 20 Eng. L. & Eq. Rep. 613, he said: "The true question is, whether

there was a *vis major* of so permanent a character as to dissolve the contract; permanent, according to all human probability, for the law never can depend upon mere possibilities." "The contract with the mariners was then at an end — not suspended, but terminated." An abandonment by the master, in apprehension of danger and to save life, is justifiable because necessary. And such an act, done *bonâ fide*, not only suspends but terminates the mariner's contract; and once terminated, nothing but a fresh agreement can properly resuscitate it. In the same case (p. 614), the court say that "if capture alone puts an end to a contract, which appears to have been the leaning of Lord Stowell, then, *a fortiori*, abandonment *ex necessitate* would do so." And every abandonment by a master should be presumed to be a necessary abandonment, and, it would seem, whether at sea or on the coast, though there is an admitted distinction.

Had the master's temporary separation from the Wyvern proved permanent, though the master may have been justified, the seaman would have been applauded. Even if bound by contract to the Wyvern, the seaman was not so bound to the John Perkins, and if the owners of the one might avail themselves of this plea, the owners of the other vessel surely could not; for there was no subsisting contract between them and Nickerson, the seaman. Was he, then, rightfully excluded from asserting a salvage claim against the latter, merely because he may have owed allegiance to the vessel of the former, under a possibly continuing and subsisting contract with them as owners of the Wyvern?

It really appears, that this precise technical rule was

in the *John Perkins* pushed by the court to an extreme; and the decision seems hardly in harmony with the primary principles of the admiralty, or with that liberal and indulgent spirit, in which admiralty law should usually be administered. Judge Story would digress in the discussion, and go out of his way to seek to solace or sustain his "wards or favorites in admiralty." The main purpose in administering this special branch of jurisprudence is or should be to do right, and tolerate no wrong; in other words, to do justice firmly but fairly. Its administration should be conducted with tenderness toward the mariner, courage toward the master or merchant, but with fidelity and justice toward all who sue for its protection, or challenge its penalties.

In this spirit, in *1 Spinks*, 17, *The Medora*, Dr. Lushington, following the example of his three immediate predecessors in office, stated that the true rule and correct practice was "to get at the truth;" while in *Dexter v. Munroe*, 2 *Sprague*, 39, Judge Sprague says, "admiralty is not restrained from doing substantial justice by mere forms or technicalities," but that it has power by its process "to do complete justice" to all parties.

These two conspicuous admiralty magistrates, like Lord Stowell, signally displayed, during their long judicial careers, those high qualities which often only long experience can confer and develop; and which, with culture, candor, courtesy, and courage on the bench, contribute to create, exemplify, and illustrate the character of a model administrator of admiralty law.

Others also may be salvors, as agents and magistrates under extraordinary circumstances; or persons giving information or advice, if contributing to any beneficial result. But no cases of leading importance

are reported unless that already cited of *Towle v. The Great Eastern*, 11 L. T. (N. S.) 516.

It remains now to recur to the *status* of ship-owners in salvage cases. Good sense, good principle, sound law, and true policy all concur in recognizing owners as persons having a standing in court, and fit persons to be made parties in claims for salvage, though formerly it was otherwise. Having enumerated pretty fully the different kinds of personal merit which entitle persons on shipboard to successfully assert their claims to salvage recompense, it remains to recur to the general doctrines of the maritime, and perhaps insurance law, which underlie and sustain the claim of ship-owners to salvage remuneration. I refer to insurance law, because the owner's property may be jeopardized by deviation, actual or constructive; if not justified, a deviation, by vacating the policy, might work a possible forfeiture of insurance and subject the owner to a total loss.

I am aware that deviation, for some purposes, is both excusable and justifiable. Thus, turning aside to succor distress or save life is a humane act, to be justified and encouraged by the law and court; and should be classed among meritorious salvage acts. A ship at sea is under the exclusive charge of the master, and beyond the control of the owners. As the owner's accredited agent, the master may legally deviate to help, aid, succor or relieve those in distress, even though, by such act, he may possibly risk the owner's insurance. Deviation, as matter *stricti juris*, is not generally permissible. If, therefore, it be right to deviate for relief at any time, it is an exception to the general rule, and so *probat regulam*. This rule is substantially stated in several authorities: *The Vine*, 2 Hagg. 2; *The Salacia*, *ibid.*

264 ; The Jane, *ibid.* 343 ; and The Martha, 3 *ibid.* 436 ; and together sustain the following propositions :—

Parties, not personally and actively engaged in effecting a salvage service, were not formerly entitled to participate in a salvage recompense. The Vine, *supra*.

But for actual losses sustained, as for supplying sails, or furnishing stores to ships or crews in distress, owners may be remunerated. The Baltimore, 2 Dods. 138.

So, for diversion from employment ; or experiencing special mischief ; or inconvenience occasioned by deviation. The Vine, *supra*.

So, by incurring loss, with consequential risk, by detention, damage, or expense, owner's claim for remuneration may be well founded. The Jane, *supra*. And for services rendered, but attended with risk to owner's property, the owners of a salving ship may be allotted a portion of the salvage awarded. The Salacia, *supra*. And here, I think, occurs, for the first time, the designation of a salving ship.

But, in The Blendenhall, 1 Dods. 417, owners were judicially deemed to possess sufficient interest to have a *locus standi* for the purpose of opposing a claim of a joint salvor ; and, finally, in the case of The Haidee, 1 Notes of Cases, 598, the owner of a salving vessel was considered a not unfit person to originate a suit for salvage.

This brief preliminary view of the law and earlier authorities readily and naturally conducts the student to the general investigation and consideration of the problem, under what circumstances and to what extent owners as such may be treated as constructive, actual, and meritorious salvors. And to that investigation and discussion, under the more recent authorities, I shall next invite attention.

All the authorities, whether of long standing, as The Vine and Branston, 2 Hagg. 3, *n.*, or of a more recent date, will be referred to, at the hazard of being deemed by the critical reader slightly prolix; and perhaps unnecessarily so. But such is the interest and importance which surrounds this particular subject of inquiry in admiralty or rather branch of admiralty jurisprudence, at the present time, that a full examination of it does not appear to be superfluous.

About one tenth part of the 644 salvage awards collected in Pritchard's Digest, are to owners and vessels, boats, tugs, and steamers. As I have estimated it, about thirty-five cases recognize owners as salvors, and twenty-five the vessels themselves. That is to say, some judgments and decrees for distribution disregard the old rule as stated in the Vine (*supra*), that effective personal service is to be rendered for salving property or assisting persons in distress by other living human beings present on the spot, or at the scene of danger.

The owner and his ship do not come within this category; and therefore, to become salvors entitled to salvage reward, it must be by reason of an exception to the rule.

Under this exception, owners are deemed constructively to take the place and share with others, in salvage awards, according to their relative merit by hazard to their insured property.

The elements of their merit and claim will abundantly appear by the cases hereafter referred to, and commented upon. The doctrines extracted from them cannot fail to commend themselves to the great and growing interests of all mercantile men in our various commercial communities.

In *The Thetis*, 3 Hagg. 62, £17,000 was first awarded; but upon appeal, the Privy Council added £12,000, making the final award amount to £29,000. This is the greatest amount, awarded as salvage, in any known reported case.

In *The Beulah*, 1 W. Rob. 477, the salvage awarded was £500, of which £415 was for the owners. In *The Waterloo*, 2 Dods. 443, whole award £4,000, owners £2,000 of it. In *The Hope*, 3 Hagg. 423, awarded by court £2,000, to owners £850. *The Helen*, 3 Hagg. 430, n., £1,300, to owners one half, £650. *The Deveron*, 1 W. Rob. 180, £1,600, owners £700. *The Carolina*, *ibid.* 124, £18,000, for owners one third, £600. *The Howard*, 3 Hagg. 256, £2,000, owners one half, or £1,000; and in *The Earl Grey*, 3 Hagg. 364, £900, owners £450; and these authorities, with others to be cited, plainly indicate the estimation in which owners of tugs or tow-boats, steamers or sailing-vessels, are likely, in future, to be held by magistrates presiding in admiralty courts.

The most recent authority, *The Golondrina*, reported 1 Adm. & Eccl. Rep. 334, is not only significant but decisive of the principles applicable to the *status* and merit of owners. There the whole salvage allowed was £1,800, the owners share £1,000; the proportion distributed to the owner being much greater than in any previously cited case, except that of the *Beulah*, *supra*.

Owners, therefore, when their vessels happen to be employed for salving purposes, may justly become entitled to share in salvage awards; and, when so entitled, their proportion should be measured by the risk run, and intrinsic merit of the service rendered by their vessel.

In the time of sailing-vessels, the rate allowed to

owners was, as a general if not universal rule, one third part of the salvage awarded. But since Fulton's successful application of that mysterious power, steam, as an agent in propelling vessels up rivers and across the ocean, the admiralty courts have steadily recognized the superior merit of large steamers, and awarded recompense accordingly in a marked and emphatic manner. Lord Stowell led the way in such recognition; and for such service, the steamers *Monarch*, *Solway*, *Jasper*, *Alhambra*, and others have since been the subjects, and their owners the recipients, of liberal remuneration by admiralty and *quasi* admiralty tribunals, in England and the United States.

In enumerating, therefore, all who may rightfully be designated as salvors, the classification would be imperfect, unless it should also contain the names of owners, as possible salvors, when their property shall have been risked and employed, meritoriously, for salving the property of others. So it is required by recent decisions and modern usage; and the rule is entirely consonant with the now established practice in admiralty courts.

Theoretically, according to the old text-writers, the mariner is the real legitimate salvor. Nevertheless, experience has taught us that there are occasions when an owner's property in shipping may not only be a potential agent, but an indispensable instrument, in securing and saving the property of another, or rescuing the crew of a stranger vessel. And when this happens, it is but just that the owner whose ship is so hazarded, should share in the distribution of the saved property, and, as co-salvor with the crew, largely participate in the salvage awarded.

By the maritime law, a master is permitted so to employ his owner's vessel; and at the treble risk of losing his owner's ship, cargo, and insurance also, by reason of such deviation for salvage purposes.

In such cases, it is good policy to reward liberally; and this policy is favored in admiralty courts; for the greater the remuneration, the greater will be the encouragement given to merchants, for furnishing masters with fitting instructions, in behalf of humanity, Christian charity, and civilization.

The merit of the mariner is no less, because the merchant's reward appears relatively greater. And though, by judicially decreeing to the latter a discretionary amount, or an aliquot part of the salvage awarded, it may seem to abstract somewhat from the mariner's individual share, yet in reality, the compensation of all may be much increased, rather than diminished, by adhering to this recognized rule and practice.

Moreover, the law encourages and adopts it as good policy; inasmuch as it furnishes worthy incentives to both merchant and mariner; stimulating the one to give broad and liberal instructions to his master; and the other to make the utmost personal exertion for the salvation of life and property, when at hazard.

The peculiar merit of a salving steam-vessel (or its owner), is, that the salving crew is enabled to go quicker and nearer to the scene of danger; be more sure of recovering from loss or rescuing from danger; and, withal, perform the service more efficiently and with less danger to themselves personally.

It is not then singular at all that the admiralty courts should award to the owners of salving steamers a liberal proportion of the salvage decreed, as good policy.

The rate has fluctuated and varied according to circumstances.

Formerly the rule was inflexible, and seldom departed from, to allow the owners of salving sailing-vessels one third. And this rule is supposed to have been acted upon in the early American cases of *The Mary Ford* (3 Dall. 188), and *The Blaireau*, (2 Cranch, 256).

But since the application of steam as a motive power, and the consequent construction of large steamers for transporting property and passengers, the old rule ceased to be inflexible; is now materially relaxed, and has gradually become obsolete; so that the rate of salvage, generally, is much enhanced both in England and the United States.

As has been stated, Lord Stowell first judicially scanned and admitted the superior merit of large steamers over wrecking and the ordinary tug boats; and in *The Earl Grey* (3 Hagg. 363), first innovated upon the then existing rule by awarding to the owners of the steamer *Monarch*, more than one third of the salvage. A like relaxation and modification of the rule is perceptible in *The Raikes*, 1 Hagg. 245 (1824); *The Beulah*, 1 W. Rob. 477; *The William Beckford*, 3 Ch. R. 355; *The Albion*, 3 Hagg. 254 (1835); *The Graces*, 2 W. R. 294 (1844); *The Haidee*, 1 Notes of Cases, 598 (1842); *The Medora*, 5 *ibid.* 294 (1845); *The Alfin*, Swab. 193 (1857); *The Kinglock*, 1 Spinks, 267 (1864); and the American cases, 3 Dall. 188, 2 Cr. 256; *Brig Cora*, 2 Wash. C. C. 80 (1827); *The Henry Ewbank*, 1 Sum. 400; 1 Am. L. Reg. 554, *The William Penn*; and in the still more recent case of *The C. W. Ring*, in 2 Am. L. Rev. 259.

In the *Earl Grey*, Lord Stowell allowed the owners

one half for their proportion ; in the *William Penn*, Mr. Justice Wayne allowed about five sevenths ; and in the *C. W. Wing*, the owners were allowed three fifths of the awarded salvage.

Having cited the *Mary Ford*, otherwise *McDonough v. Danery*, as an early illustration and authority of the one-third rule, it is proper to state that case more fully, in order more correctly to appreciate its value as an authority. As I understand the report, the case was manifestly a mis-trial in the District Court. Substantially the facts are, that the *Mary Ford*, a British ship, was captured in 1794, by the fleet of Commodore Vil Manderine, under the French Republic, in mid-ocean, where she was abandoned by the captors the day after the capture ; and in that situation was fallen in with by the American ship *George*, manned out by part of the American crew, and brought safely into Boston harbor ; there libelled in the District Court by William Foster and others in behalf of the owners and crew of the *George* ; ship and cargo sold, by consent of parties, at an excess of \$8,241.43 over the appraisement of \$35,986.27 ; and the whole proceeds of the sale, \$44,227.70, less costs and charges, held to abide the decision and award in behalf of the finders and intervening claimants. The resident British Consul, Thomas McDonough, intervened for the British owners ; and T. B. Thomas Danery intervened for the captors, as resident consul of the French Republic ; McDonough and Danery thus being the nominal parties.

The District Judge, John Lowell, allowed as salvage for all the libellants one third part of the gross proceeds ; and two thirds of the salvage was awarded to the owners ; but did not make any decree as to the resi-

due, except that it was to remain for British owners or others deriving right thereto.

An appeal was claimed to the Circuit Court by the French consul. Danery, there heard, and Mr. Justice Cushing gave judgment in favor of the French Republic and those concerned in the capture.

And by appeal, the case was carried up to the United States Supreme Court, there argued for the British owners and French captors ; but no one appeared for the original libellants, the owners and crew of the salving ship. In the Appellate Court, it was substantially determined that the British owners were divested, by capture, of their property and rights in the ship ; that the captors had sufficient firm possession of their prize ; but afterward voluntarily abandoned the *Mary Ford*, leaving her a derelict ship at sea ; that the district judge, having rightfully exercised jurisdiction of salvage, might, with equal propriety, have adjudicated upon the residue, and awarded it, in whole or part, to the libellants. But the owners and crew, not having formally appealed, they were not strictly before the Appellate Court as parties. Wherefore, the Supreme Court declined to disturb the decree, or change the proportion or award in any respect ; but strongly intimated, however, that no right revived by postliminy to the British owners, in consequence of the abandonment by the captors, because there was no recapture.

The brief opinion of the court was as follows : —

BY THE COURT. We are all unanimously of opinion the District Court had jurisdiction upon the subject of salvage ; and that, consequently, they (it) must have power of determining to whom the residue of the property ought to be delivered.

"In determining the question of property, we think, that immediately on the capture, the captors acquired such a right as no neutral nation could justly impugn or destroy; and, consequently, we cannot say, that the abandonment of the *Mary Ford*, under the circumstances of the case, revived or restored the interest of the original British owners.

"Some doubts have been entertained by the court, whether, on the principles of an abandonment by the French possessors, the whole property ought not to have been decreed to the American libellants; or, at least, a greater portion of it, by way of salvage; but, as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the cause.

"Upon the whole, let the decree be affirmed."

By an inspection of the original record it appears that the owners really received two thirds of the amount awarded as salvage. The case, therefore, of *McDonough v. Danery* is not and ought not to be cited as an authority for the old rule of awarding to the owners one third of the salvage reward for their ship's claim and service.

But the conceded claim of owners to share in salvage, at the present day, is established by a series of cases, many of which have already been referred to and others will be cited hereafter.

In 1844, Dr. Lushington, in delivering his judgment in the *Graces*, said: "To render assistance to vessels in distress is an ingredient in awarding remuneration."

In 1857, in the *Alfen*, the same judge looked with favor upon steamers salving vessels aground, because of the celerity and efficiency with which the service is performed.

In 1864, the same experienced judge in admiralty declared in the *Kinglock*: "The principle I have always endeavored to follow is this, that where steamers render salvage service they are entitled to a greater reward than other set of salvors, who render the same service; and for this plain reason: in consequence of the power they possess, they can perform such services with infinitely greater celerity than any other vessels, with infinitely greater safety to the vessel in danger, and frequently under circumstances in which no other assistance could by possibility prevail."

Thus, by a process called by the civilians a species of novation, the claim of owners, in behalf of their ship when employed in salvage service, is delegated, subrogated or substituted for what might otherwise be the claim of an active, living, and volunteering crew, who personally incurred the peril and contributed to or participated in the exertions and service requisite to constitute them legal salvors and entitle them to salvage remuneration.

This is not only technically a sound principle, but it will be seen by the authorities cited, that the principle is now incontestably the established law in admiralty, by the courts of England and the United States.

In the *Norden* (1 Spinks, 185), it was held that smacksmen, like steamers, may become salvors. In the *Collier* (1 Adm. & Eccl. Rep. 83), that an owner of a salving steamship, though also charterer of a salved sailing-ship, was not barred by the fact that owner and charterer were one and the same persons.

In the *Elizabeth and Jane* (Ware, 39-40), in a decree of salvage, the captain, who was also owner of the *Merit*, was awarded his share as master, and also his share as owner.

From what has already been stated in this treatise upon the *status*, merit, and rights of owners in admiralty, where their own property has been placed at hazard, for the purpose of salving the property of others, may readily be gathered what may be the legal grounds of their claim to salvage; and under what circumstances the *quantum* should be augmented or diminished by the Admiralty Court, in awarding salvage or decreeing its distribution.

Judges should ever bear in mind that the policy of the law is to stimulate and encourage others to engage readily in rendering salvage services.

It may be useful, therefore, to examine to some extent the nature of salvage as a contract, on leaving the subject of owners and their rights and privileges.

The nature of salvage, as a contract, is discussed in 1 Story, 314, 340 Pigs of Copper. In meritorious cases, it is deemed good policy to award a liberal salvage recompense. It is just as well as politic, in salvage suits, to so administer the law, as to encourage others to make exertions, and render voluntarily, at the proper time, such needed salvage service as may be likely to prove useful, and contribute to the ultimate security of life and property. Admiralty courts, therefore, acting upon this policy, generally reward liberally, in order to induce persons, in a situation to become salvors, to tender and render, in time of wreck or distress, such assistance opportunely. So doing, they may not only beneficially affect commerce and the shipping interest generally, but may also efficiently contribute to the preservation of human life.

And since the enactment of the Merchant Shipping Act, in England, it has become, since 1854, the duty of

the Admiralty Court to give a corresponding reward for the salvation of life and salvage of property. *The Bartley*, Swab. 199, *ibid.* 205; *The Coromandel*, Lush. 81; *The Eastern Monarch*, *ibid.* 182; *The Johannes*, Brown. and Lush. 306; *The Pensacola*, *ibid.* 341; *The Fusilier*, 10 L. T. (N. S.) 699.

Mere good intentions, or wishes, however expressed but not acted upon, are utterly insufficient to sustain a claim for salvage. Not only must an expressed intent or wish be acceptable and welcome; but it should be accompanied and followed up by some corresponding effort, producing a beneficial result. Thus the subsequent act may render the former expression meritorious. In plain terms, property endangered must be actually rescued from impending peril; or, if lost, must be recovered by a salvor's agency, for the owner's benefit; such agency being attended with some personal danger, voluntarily incurred. 4 Wash. C. C. 651, *Brig Dodge*; *Newb.* 421, *T. P. Leathers*.

And it would not be an unapt definition of salvage service to say, that it consisted in securing property from probable marine loss; or recovering it from actual present loss, from perils of the sea, for its owner, with hazard to the salvor. *Olcott*, 462, *The John Wurtz*.

There may be two sets of salvors; called first and second salvors. If, therefore, one set of salvors, while performing a salvage service, themselves fall into distress, and are relieved by another set of salvors, the first salvors do not lose their right to salvage; but the second salvors are permitted to participate with the first, according to their several merits. To require the original salvors to relinquish all claim to salvage, before the second set of salvors give the necessary assistance,

would be imposing an inadmissible condition, which in admiralty should be judicially disregarded. *The Henry Ewbank*, 1 Sum. 400; *The E. U.*, 1 Spinks, 63; *The Undaunted*, Lush. 92; *The Samuel*, 4 Eng. L. & Eq. 581.

Where one set of salvors have possession of, and are striving to bring into port and save, an abandoned vessel, another set are not permitted to interfere and partake of the salvage, unless the first set of salvors appear to be unable to effect the saving without the aid of the second salvors. 1 Gilp. 60, *Hand v. Elvira*.

It is in consonance with the established principles of maritime law, to hold those entitled to be regarded as meritorious salvors, who begin the salvage service and are in the successful prosecution of it.

It may be stated, generally, that parties taking possession, have a right to retain it until the salvage is completed; and no other person has the right to interfere with them, provided they are able to effect the salvage, and are conducting the business with fidelity and vigor. *Olcott*, 77, *The John Gilpin*.

An indispensable ingredient of a salvage claim is that the service rendered has contributed immediately to the rescue or preservation of property in peril at sea.

The title of salvor arises from actual possession of property in peril, with power to save it, and the actual employment of means to that end.

Notorious possession, with the avowal of the object of such possession, are cardinal requisites to the creation or maintenance of the privileges of a salvor; and where they do not exist, any other person may take the property with all the advantages of the first finder. *Olcott*, 462, *The John Wurtz*.

Such is the clear policy of the law. It rewards liberally a meritorious salvor; but it counts first in the order of his meritorious acts, a prompt use of sufficient means, both in getting at property needing relief, and abiding with it till its salvage is completed. The value of such services is enhanced, and their compensation augmented proportionally to the danger and loss to the salvor attending such exertions, and their benefit to the owner. *Olcott*, 462, *The John Wurtz*.

And while salvors are engaged as such, they are legally entitled to the sole possession of the property to be salvaged. If others interfere, such interference is a wrongful interruption; even if done by those who complete the salvage and bring in the salvaged property. 1 *Dods*. 417, *The Blendenhall*; 2 *Hagg*. 361, *The Carlotta*; *Edwards*, 175, *The Maria*; 3 *Hagg*. 243, *The Queen Mab*; *ibid.* 167, *The Effort*.

Original salvors in possession have a qualified property in the salvaged property. Courts guard with jealousy these rights, and uphold them. Legal dispossession without cause is impossible. *Vide* also, 1 *W. Rob.* 410, *The India*; 3 *Hagg*. 160, *The Eugene Bourne*; 2 *W. Rob.* 306, *The Glasgow Packet*; and 3 *Hagg*. 385, *The Dantsic Packet*.

Under extraordinary circumstances, then, it is plain, that salvage services may contingently be rendered by officers, seamen, pilots, passengers of either sex, agents, magistrates, engineers, and even by the master on board of the ship imperilled, or which has perished by sea-peril or "*cum vi ventorum*."

The ordinary claims of salvors give rise to no controversy about their right, or even merit, except so far as it may supply a mode or means of fixing the *quantum*.

But in extraordinary claims, then, the primary question is the salvor's right; that being settled, then a contest arises to ascertain the degree of merit, and finally to determine the *quantum* of salvage to be allowed. It is equitable that the award should be reasonable. In military salvage cases, the *quantum* is an *aliquot* part, limited in different countries by some statutable provision. In civil salvage causes, what shall be awarded is a matter of judicial discretion, varying according to the recognized principles of the general maritime law, and not fixed by any prescribed municipal regulation.

In administering this law, it is alike the privilege and province of a judge in admiralty to pronounce judgment in behalf of substantial justice, or in deference and obedience to the well-known principles and precepts of maritime law.

The function of drawing the precise line where salvage service begins and contract duty ends, in the case of seamen, is not always easily performed. It is often quite difficult and embarrassing even for those possessing the highest capacity for the judicial office. In investigating the marine rights and settling the legal *status* of mariners and merchants, mere learning will not alone suffice, but something more is requisite. There should be superadded also a predisposition to do right for the sake of the right and do justice for justice's sake. Accordingly, the fixing of the *quantum* of compensation, in civil salvage cases, is left unreservedly to the court's discretion, unrestricted by any statutable limit. The court are, therefore, at liberty to award a larger or less sum, as the facts may justify or circumstances seem to require.

An asserted salvage service, at first, may appear to

be devoid of every ingredient and quality of salvage merit; approximating so nearly to the performance of stipulated duty under a contract obligation, that it may be next to impossible to discriminate the one from the other with precision. Thus a towage service may be so near akin to a salvage service as to embarrass any court; and it has, elsewhere, been already stated that a pilotage may be elevated to the rank of a salvage service. Admiralty courts, therefore, are wisely clothed with discretionary powers; and, together with legislators, are constantly modifying for the sake of ameliorating certain antiquated dogmas of the general maritime law.

In cases of derelict, distress, and shipwreck, fragments are now held subject to lien for payment of wages, even if freight be not earned. The remains of a wreck, or fragments rescued in derelict, should be sold; when sold, the proceeds should be held to constitute a fund to be applied first to the discharge of the mariner's lien for wages. Grave doubts have been entertained and expressed by high authority as to the proper designation of this compensation. Whether it should be salvage, wages, or *quasi* salvage, or wages in the nature of salvage, or wages paid under an exception to the rule, or generally *quantum meruit, pro opere et labore*. In this uncertain state of shifting and conflicting opinions and oscillating decisions, it was long doubtful what would and should ultimately be its "true designation." Kent, Story, Stowell, and Judge Ware all seemingly differed. In the *Neptune* (1 Hagg. 227), which was a shipwreck with fragments saved, Lord Stowell upheld a suit for wages, *eo nomine*; but stated it to be "an exception" to the rule making wages dependent upon the earning of

freight. Kent calls it "rather a claim for salvage," but misnamed wages (3 Kent, Com. 196). In the *Two Catharines* (2 Mason, 334), Judge Story says, "the claim for wages is fully supported by maritime policy." But, in the *Massasoit* (1844, 1 Sprague, 97), which was a case of shipwreck and abandonment, but with remnants saved, Judge Sprague says, "we may give its true designation, — wages *as such* are recoverable." And this decision Kent, in a note (3 Com., p. 251), pronounced to be "a startling violation of a principle of maritime policy." Hitherto the decision has remained unshaken; and the courts have not appeared to be greatly startled. On the contrary, the legislators of the British Parliament promptly proceeded *pari passu*, with an American district judge, by formally abrogating all law which required the payment of wages to be thereafter dependent upon the earning of freight.

After its abrogation in England (1845), Judge Betts, in *Davis v. Leslie* (Abbott, 130), denounced the rule as an antiquated "figment," often "oppressively enforced against seamen."

There has been great incongruity in the courts in striving on the one hand to uphold this old axiom in its entirety; on the other, in struggling to so qualify it as to render it easy to conform to it according to circumstances.

Before England legislated, or Dana, *arguendo* in the *Nippon's Crew*, (7 Law Rep. p. 266), predicted its extinction, the old dogma was judicially extinguished by Judge Sprague; he, unlike others, not having "the fear of it before his eyes." He could not "propitiate it by a misnomer;" and would not call wages salvage; but asserted that "wages are the legitimate offspring of the mariner's contract united with performance."

The maxim has worked mischief enough already, and should have expired before British legislation, in 1845, pressed the life out of it. C. J. Kent, in *Dennett v. Tomhagan* (3 Johns. 156), could and should have performed its final office, and not left it for Judge Sprague.

The axiom, though quaint, is not and never was true. The mariner contracts to perform; and performance, according to stipulation, generates his title to wages. He does not stipulate to insure freight; that would neither be within his province or power. It lies exclusively within the control of the owner to secure freight or risk its loss.

Thus in the *Saratoga* (2 Gall. 175), Mr. Justice Story says: "If the voyage or freight be lost by the negligence, fraud, or misconduct of the owner or master, or be voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies, differing from the general rules of maritime law; or if he have chartered his ship to take freight at a foreign port, and none is to be earned on the outward voyage; in all these cases, the mariners are entitled to wages, notwithstanding no freight has been earned."

And in the *Neptune* (1 Hagg. 227), the *Lady Durham* (3 *ibid.* 196); and *Sidney Cove* (2 Dods. 13); it was held substantially, that though in shipwreck the cargo be lost, still if the proceeds from a sale of the fragments were sufficient to cover wages, the mariner was entitled to be paid. *Vide* also the *Reliance* (2 W. Rob. 119).

It therefore appears, that the opinions of legal minds have been quite fluctuating and even antagonistic, in regard to the soundness of the maxim, that freight is

the mother of wages. Lord Stowell and Mr. Justice Story deliberately question its soundness; Judge Betts denounces it as an "old figment," oppressive to the seaman; and Judge Sprague (*oblorto collo*), like a strong man and great magistrate, grapples with the maxim itself in 1844, and tramples upon it. And his opinion preceded the enactment of ch. 112, 7 & 8 Vict., by § 17 of which it was enacted, that seamen of vessels wrecked or lost may earn and recover wages, though no freight be earned.

By sections 182 and 183 of the Merchant Shipping Act, passed in 1854 (cited as ch. 104, 17 & 18 Vict.), all agreements with seamen signing away their rights were declared null; and their claims to recover wages were no longer dependent upon the contingency of earning freight.

In England, therefore, the obnoxious, and, as Judge Betts called it, "oppressive," dogma is now superseded and ameliorated by legislation. And a similar course might be wisely pursued by the Congress of the United States, unless the adjudged cases, already referred to, practically render such American legislation superfluous.

Having been so often disclaimed or disavowed, as a portion of the condensed good sense of maritime law, it may be supererogatory to further denounce it as a fancy or "figment;" and therefore the maxim may safely be left to the courts or Congress, to become ultimately obsolete in the one, or supplemented with new legislation in the other.

The authorities to uphold the controverted rule are: 1 Pet. Adm. 48, *The Cato*; *ibid.* 79, *The Harmony*; *ibid.* 204, *The Cynthia*; 2 *ibid.* 424, *The Catharine Maria*; 2 Mason, 319, *The Two Catharines*; Gilpin, 77, *The*

Sophia; *ibid.* 188, The Hercules; 3 Mass. 563, Frothingham *v.* Prince; 5 *ibid.* 253, Coffin *v.* Storer; 3 Johns. 156, Dunnett *v.* Tomhagen; and 3 Kent, Com. 195, *et seq.*

Authorities not yet cited, and not upholding it, beside The Massasoit, *supra*, are The America, Newb. 195; The John Taylor, *ibid.* 341; The Wave, 2 Paine, 131; The Dawn, Davies, 121; Reed *v.* Hussy, Bl. & Howl. 523; The Reliance, *supra*, and the Holder Borden, 1 Sprague, 144.

This last case is one of singular interest in its main features. The Holder Borden was a whale-ship belonging to Fall River. She was commanded by J. J. Pell. In the Indian Ocean, the ship struck upon a coral reef, not designated on any chart; but in sight, however, of a low sand island, and many miles distant from any inhabited land. Such was her situation, that rescue seemed to be hopeless, and recovery of ship or cargo impossible. Captain Pell, however, on the reef, formed his only plan of ultimate safety: which was to construct on the island a schooner craft from the materials to be saved from the stranded ship. By means of these remnants, and the structure formed from them, he hoped to secure his ship's company, and such portions of the cargo and oil, as might prove to be practicable. After months of time, toil, and perseverance, difficulties, almost insurmountable, were measurably overcome; and his craft, called the Hope, was launched, equipped, and started for Oahu. Arriving there, another vessel, the Brig Delaware, was purchased and laden. And after an absence of nearly three years, Captain Pell had the satisfaction of returning to his home port, with the purchased brig, a quantity of

oil and some portion of remnants, saved from his wrecked ship, the *Holder Borden*. What became of his extemporized schooner craft does not appear in the report. Had she returned to the United States, she must have been a curiosity in naval architecture, worth seeing if not saving. Held, the master and crew were not salvors, but the *Hope* was their property, and they were entitled to pay for transporting cables and anchors of the ship to Oahu; that the purchased brig belonged to the owner, who had a lien for compensation for service beyond risk and expenses.

In 1 *Sprague*, 91, and *ibid.* 428, 210 Barrels of Oil, and the *Triumph*, are instructive cases upon the *quantum* and merits of salvage.

And although the books make the distinction between the right to wages or salvage, the one ought not in future to be confounded with the other. Each should be designated by its proper appellation. For a good judge, *stare decisis* is a safe rule, where there are decisions to be followed. But without such decisions the practice may mislead, as construction and *a priori* reasoning may imperceptibly take the place of authority. The quaint maxim, however specious it may seem, clothed in axiomatic language as usual, that freight is the parent or mother of wages, is not now and never was a strictly legal truth. This may be tested by reference to the causes or grounds of forfeiture of wages.

Thus the seaman forfeits his wages, in whole or part, and *in poenam* always, by drunkenness, insubordination, disobedience, negligence, embezzlement, desertion, or other wrongful absence; piracy, mutiny, revolt, running away with a vessel *animo furandi*; or any other unspeci-

fied misconduct, developing itself in inability or indisposition to perform his contract duty and terminating in non-performance of his contract obligations. To all these, the principle of forfeiture strongly applies; not because by these acts freight is not earned, or is lost, but because they constitute a breach of contract. The violation of the contract is the gist of the real legal offense. The loss of freight may be an incident, and often is a consequence of such violation; but cannot supplement the real offense, which is the non-performance or breach of a mariner's contract stipulation.

Under four considerations, may salvage service be proffered and rendered: in cases of distress, rescue, recapture, and derelict.

Many authorities, old and recent, may be cited to each of these conditions.

I. Where salvage has been rendered in cases of distress; and the English authorities are usually: *The Sarah*, 1 Rob. 312; *The William Bickford*, 3 Rob. 355; *The Vrow Margaretha*, 4 Rob. 147; *The Baltimore*, 2 Dods. 132; *The Clifton*, 3 Hagg. 120; *The Ranger*, 9 Jur. 119; *The City of Edinburgh*, 2 Hagg. 334; *The Sappho*, Swab. 242; *The Santipore*, 1 Spinks, 234; *The Paris*, *ibid.* 289; *The Undaunted*, Lush. 92; *L'Esperance*, 1 Dods. 46; *The Elenora Carlotta*, 1 Hagg. 156; *The Nicolai Henrich*, 22 Eng. L. & Eq. 615; *The Houthandel*, 1 Spinks. 25. In this last case, it would seem that salvors, when in possession, are authorized to take a salved ship to the port most convenient to themselves. *The Silver Bullion*, 2 Spinks, 74; S. C. "Shipping Gazette" of Dec. 8, 1854, and 2 Pritch. Adm. Dig. 1081-86; *The Lady Worsley*, *ibid.* 253. Salvors, retaining possession from owner's agent, forfeit

salvage for misconduct. *The Wear Packet*, *ibid.* 256. The court refused to entertain claim of parties convicted for misconduct in same transaction. *The Bõmarsund*, *Lush.* 77. Services accepted in distress. *The Little Joe*, *ibid.* 88; a case of ambiguous signal and information; and the case of *Towle v. The Great Eastern*, 11 *Law Times* (N. S.), 516. While the American authorities ordinarily cited, are *The Blaireau*, 2 *Cranch*, 240; *The Elvira*, 1 *Gilp.* 60; *The Centurion*, *Ware*, 477; *H. B. Foster*, *Abbott*, 222; *A Raft of Spars*, *ibid.* 291; *Miller v. Kelley*, *ibid.* 564.

II. Where salvage has been rendered in case of rescue, the English authorities are: *The Two Friends*, 1 *Rob.* 271; *The Beaver*, 3 *Rob.* 292; *The Resolution*, 6 *Rob.* 23; *The Governor Raffles*, 2 *Dods.* 14; *The Francis and Eliza*, 2 *Dods.* 115; *The Salacia*, 2 *Hagg.* 262; *The Florence*, 20 *Eng. L. & Eq.* 607. And the American authorities are: *The Harmony*, 1 *Pet. Adm.* 70; *The Fair American*, 1 *ibid.* 87; *The T. P. Leathers*, *Newb.* 421; 2 *Sprague*, 101, *The James T. Abbott*; signal for aid, a foundation for claim of salvage; *ibid.* 51, a Quantity of Iron. Claim of parties unnecessarily interfering with wrecked property is not admissible.

III. Where salvage service has resulted in recapture, the English authorities are: *The Santa Cruz*, 1 *Rob.* 49; *The San Bernardo*, *ibid.* 178; *The Haas*, *ibid.* 286; *The Amor Parentum*, *ibid.* 303. And the American authorities are: *The Harriet*, *Bees. R.* 128; *Bas v. Tingey*, 4 *Dall.* 37; *The Amelia v. Talbot and Seaman*, 1 *Cranch*, 1; *The Harmony*, 1 *Pet. Ad.* 70; *The Fair American*, 1 *Pet. Ad.* 87.

IV. Where salvage claim is set up in cases of *derelict*, the English authorities usually cited are: *The Aquila*,

1 Rob. 37; The Fortuna, 4 *ibid.* 193; The Jonge Bastiaan, 5 *ibid.* 322; The Elliotta, 2 Dods. 75; King *v.* Property Derelict, 1 Hagg. 383; The Charlotte, 2 Hagg. 361; The Caroline, 2 W. Rob. 124; The Watt, *ibid.* 70; The Effort, 3 Hagg. 165; The Windsor Castle, 2 Notes of Cases, Supp. 13; The Clarisse, Swab. 129; The Santipore, *ibid.* 231; The Jan Hendrick, *ibid.* 181; The Persia, *ibid.* 166; The Orbona, *ibid.* 161; The E. U., *ibid.* 63; The George Dean, *ibid.* 290; The Minerva, 1 Spinks, 271; The Fenix, 1 Swab. 13; The Cosmopolitan, 6 Notes of Cases, Supp. 17; The Coromandel, Swab. 205; The Barefoot, 1 Eng. L. & Eq. 661; The Samuel, 4 Eng. L. & Eq. 581; The Florence, 20 *ibid.* 122; The Britannia, 3 Hagg. 153; The William Hamilton, *ibid.* 168; The Derelict Unknown, *ibid.*; The Jubilee, 3 Hagg. 43; The Champion, Brown. & Lush. 69. There a master left for assistance, and while absent others took possession. On his return, the master resumed possession and displaced the other parties. Held justified.

And the American authorities are: The Mary Ford, 3 Dall. 388; Rowe *v.* Brig —, 1 Mason, 372; The Bellona, Bee, 193; The Belle Creole, 1 Pet. Ad. 34; The Emulous, 1 Sumn. 207; The Boston, *ibid.* 328; The Nathaniel Hooper, 3 *ibid.* 542; The Henry Ewbank, 1 *ibid.* 400; 140 Bbls. Flour, 2 Story, 195; The Rising Sun, Ware, 378; The Bee, *ibid.* 322; The Elizabeth & Jane, *ibid.* 35; The Amethyst, Davies, 20; The John Perkins, 21 L. Rep. 87; The John Gilpin, Olcott, 77; Post *v.* Jones, 19 How. 161; The Galaxy, Bl. & Howl. 273; The Schooner John Wurtz, Olcott, 462; The Hercules, Gilp. 184; The Saratoga, 2 Gall. 187; The Two Catharines, 2 Mason, 319; Pitman *v.*

Hooper, 3 Sumn. 60; 1 Newb. 412, *The Delphos*; *ibid.* 421, *The T. P. Leathers*; *ibid.* 329, *The Charles*; 1 Gall. 132, *Tyson v. Prior*; 2 Sprague, 48, *The Czarina*.

From these authorities it may be gathered,

First, What, in legal contemplation, constitutes derelict, by the maritime law.

Second, When, in any just sense, the mariner is so absolved from his allegiance to his ship and contract, that he may become a salvor and legally participate in a meritorious salvage claim; and, generally, what principles of maritime jurisprudence control and govern admiralty courts, in awarding salvage, fixing the amount, apportioning it among salvors, and designating the salvors in derelict cases.

Derelict has been defined by Dr. Lushington; and his definition is in consonance with the admitted practice, since 1798, of his three predecessors, Lord Stowell, Sir Christopher Robinson, and Sir John Nicholl. That definition may be found clearly and succinctly stated in the *Florence* (20 L. & Eq. 607); and it is this substantially: that a ship or cargo when abandoned at sea, by order of the master, with no purpose of returning to, or prospect of regaining it, becomes in law derelict.

On authority, principle, usage, and in every just sense, it is a legal maritime derelict; and the direct effect is, to set aside the shipping contract as between mariner and merchant; compelling all to look out for self-preservation; while the logical and legal result is, to liberate the mariner himself from further allegiance to the ship, unless in exceptional cases.

The judgment of the master, acting on the spot, as the owner's lawful agent, is in law conclusive; and the mariner, thus released from his covenanted duty of aid-

ing to his utmost ability in the navigation and preservation of the ship, is left free to volunteer, either for salvage or other service.

And so, accordingly, in many cases it has actually happened, that the sailor himself may and has become salvor even of his own ship, or any portion of its fragments; thus practically suspending the ancient rule or axiom, that freight is the mother of wages as to the sailor.

The sailor may also become salvor of other ships. A case of this description occurred in 1844, the *Two Friends* (2 W. Rob. 349). There the crew of a stranded ship took to the boats; fell in with another stranded vessel; boarded her and safely brought her into an English port. Their owner claimed to participate with them in the salvage to be awarded, upon the grounds, that some of the salvors were his apprentices; and that the salvors, in effecting the salvage, moreover, had the use of his boats, ropes, sails, and compass. But the interposed claim of the owner was properly rejected; and Dr. Lushington awarded £300, to the crew only, as salvors.

There are then at least three ingredients essential to a marine abandonment: and unless all concur, there can be no derelict. The presence of all make the *delictum* legally and certainly derelict; the absence of any one leaves it equivocal and doubtful. Construction alone can complete it.

The ship, then, must be in peril at sea; abandoned by the crew, *sine spe recuperandi ac sine animo revertendi*; and it must be by the master's order or other equivalent act. These, occurring together, render the preliminary abandonment a legal maritime act; and

leaves the forsaken property in the condition of a marine derelict, with all the qualities, incidents, and liabilities of that species of property.

The shipping articles are theoretically annulled ; the mariner of the forsaken ship, by operation of law, is practically discharged from the further performance of his stipulated duty ; and thereby the theoretical union of interest has been practically terminated as between the merchant and mariner ; while the latter is left to consult his own security and interest ; being by act of the master and operation of law, legally absolved from his contract obligation of navigating and preserving the ship for the owner ; and consequently rendered incapable of earning further wages for himself under his contract with the owners.

Claims for salvage, against derelict property, are governed accordingly by like principles as govern such claims in other cases. The elements and ingredients, which constitute the merit of such claims, are similar in all. The service must be voluntary, and the award should be adequate. The amount is regulated by the circumstances of each case ; and is fixed at the discretion of the court. But the old rule, giving a moiety of the salvaged property to the salvor in derelict cases, is now practically abrogated ; the standard being adequate compensation according to the merit of the service performed ; and the award, usually, is in proportion to the value of the property saved, the exertions made, and the risks run by the salvors ; and not a definite, fixed, aliquot part prescribed as the old rule presupposed.

In several decisions, as the *Blaireau*, the *Holder Borden*, the *Neptune*, (1 Hagg. 236), the *Florence*,

and the Warrior, in Lush. 476, the mariner is pronounced salvor of his own ship; and, as such, entitled to salvage reward. This, if it be an exception to the contract stipulation, turns upon the existence and presence of the three elements, already stated to be essential and preliminary to a marine abandonment. Not only must the *spes recuperandi* but also the *animus revertendi* be wanting; a sea peril must exist; and, when these concur, the crew take to the boats, and the ship is forsaken by the master's direction, or his example even, as I think, then all, together, constitute and consummate the legal preliminary act of a marine abandonment, necessary to sustain a claim for salvage, on the part of the crew; and when this actually takes place, then follow all the legal consequences of dissolving the contract, severing or suspending the mariner's allegiance to his ship, absolving him from his covenanted duty, and as a corollary from all, restoring him generally to the normal and natural condition of man, with the right of self-preservation, and freedom to seek first his own safety, himself selecting the proper method and means, and afterwards doing what he may voluntarily do in order to preserve such materials as will ultimately secure and keep alive his claim and lien for wages: and that lien attaches even to the last plank of an abandoned and derelict ship; for the lien of the seaman for his wages, inheres, adheres, and coheres to every fragment and timber-head of a lost or stranded vessel, for the seaman's benefit. It co-exists in the salvaged property until the whole fund produced by the proceeds of any sale thereof is entirely exhausted. The lien itself, whenever it once attaches, being inalienable, unassignable, and even inextinguishable; so remains, unless, by

some recognized mode of legal proceeding or voluntary discharge, as by payment, bail, satisfaction, or other security, or judicial sale, loss, or destruction of the *res ipsa*; or by want of diligence in the creditor himself, his lien shall have become legally and permanently extinct.

Whenever, therefore, in the judgment of the master, who (*pro hac vice*) is the accredited legal agent of the owner, all hope of recovering, and purpose to return to a foundered or stranded ship, are gone, and the master's orders to abandon are issued; these together constitute and consummate what may be technically termed, a legal maritime abandonment.

The cited authorities will be found to have well defined, expounded, and properly qualified the general principles of maritime jurisprudence, as applicable to cases not only of derelict, but also of distress, rescue, and recapture; the merit generally of salvage service; the amount to be awarded; and the mode of apportioning what may be judicially awarded in admiralty among the salvors.

In the case of the *Charlotte Wylie* (2 W. Rob. 495), the vessel was returning to England from Africa. The master and one mariner were sick with fever, and so incapable of duty. A signal of distress was displayed, and the commander of H. M. S. *Cygnets* put on board the *Wylie* a master and two seamen to assist in navigating her home to England; and for this service, salvage was claimed by the commander and crew of the *Cygnets*, and it was pronounced for. The owners interposed a claim for freight, primage, and insurance, but it was disallowed.

In the *William* (2 W. Rob. 522), a tender was rejected; but the court adjudged it to be sufficient, and condemned the salvors in costs. This, in England, is according to a strict rule of the admiralty.

As to tender and costs, *vide* Lush. 11, *The John*; *ibid.* 85, *The Sovereign*; *ibid.* 485, *The Comte Nesselrode*; 2 W. Rob. 9, *The Hope*; 1 *ibid.* 334, *The Ocean*; 6 Notes of Cases, 290, *The Johannes*; 1 Spinks, 171, *The Batavier*; 2 *ibid.* 252, *The Hopewell*; Swab. 168, *The Legatus*. Generally, if a tender, duly made, is deemed by the courts sufficient, it is followed with no costs; but this general rule may have an exception, where peculiar circumstances, of a mitigating character may seem to justify a departure.

In the judicial exposition of the principles of maritime law, applicable to salvage, it matters but little whether the claim be for civil or military salvage. Of course, there is a distinction, but it is in the facts to be dealt with rather than in the rules and principles to be applied to those facts.

Salvage is called civil, when it arises in a case of derelict or distress; military, when it grows out of a recapture conjointly with land forces, or wholly or in part by them, or by rescue from pirates or other enemies.

And the chief distinctive feature in civil and military salvage is; that whereas in the former, the amount to be awarded as salvage is confided to judicial discretion and governed by the general maritime law; in the latter, the award is to be made and its amount fixed and regulated by statute, as in the United States and England, and not at all left to the discretion of the court. In both countries, the rule is to give to salvors, who claim a military salvage, one fifth, sixth, or eighth part of the salvaged property. In other respects, the claim is settled upon principles, which are alike applicable to both civil and military salvage.

Having collected and cited the principal authorities,

usually referred to in discussing and adjudicating salvage claims, in the various cases of derelict, distress, rescue, and recapture, it is apparent, that all marine losses, by foundering at sea, stranding on a coast, or by wreck generally, will be governed by the rules and principles laid down by the admiralty courts in the decisions of those cases as reported.

For many considerations, the subject of salvage must ever be one of intense interest to the student of admiralty law.

The late Hon. Rufus Choate, whose name and fame are deeply cherished, where he was first and earliest known in the courts as an advocate and jurist, delivered a glowing and highly popular lecture, in his own peculiar style, on what he termed "the Literature of the Sea." In that elegant but now lost lecture, the untold dangers and delights of sea-life were graphically depicted by him: the vast ocean, with its unexplored depths, hidden treasures, sublime scenes, marvellous views, golden glories of sunrise and sunset, myriads of inhabitants, music, murmurings, and mountains of obstacles and perils, were represented as having made, to many mariners, their chosen vocation a most engaging, attractive, and even fascinating pursuit. There the mariner's real character was strikingly developed; his courage cultivated; and personal daring so displayed that man often seemed to be more than mortal. Moulded by nature for ease, indolence, and luxury, as a mariner, he is made to laugh at labor and defy danger. The mariner, in a tempest at sea, or by the winds forced upon a lee-shore, may concentrate the effort and energies of a whole life into a moment; his every act and exertion (like those of a general on the field of battle when surprised)

may be, in the highest degree, intensified, whether the act called for be one of judgment, skill, prudence, gallantry, or adventure and activity.

Hence, the topics in salvage cases are invested with an unusual interest; and are ordinarily more exciting than all others (except perhaps those arising out of collision); so that they seem to be well calculated to give scope and occasion for the attractive display of all those highest of professional gifts, logic, rhetoric, learning, and judgment.

CHAPTER VI.

GENERAL AVERAGE.

JETTISON is a marine loss incurred by casting goods overboard, and rendered necessary to be so voluntarily incurred from some supposed or actual impending peril, which cannot apparently be warded off by any possible human agency, in season to secure the general safety of ship or cargo.

The occasion, therefore, for throwing overboard merchandise of value or bulk, belonging to individuals, in order to lighten a vessel and so save other portions of the cargo, or the ship itself, from being wrecked on shore, or foundering at sea, presupposes certain conditions of danger to exist, which man cannot control ; and which, therefore, if not provided for seasonably, may ultimately result in the total loss of ship, or peril to cargo and crew. And these conditions are, *First*, there must exist great stress of weather and consequent imminent peril occasioned thereby ; or *Secondly*, there must exist such pressing hostile pursuit and consequent danger of capture by enemies or pirates, that no chance or hope even of escape seems possible, but by jettison, to lighten or relieve the vessel and so increase her speed ; or *Thirdly*, there must exist generally, such sudden or unforeseen peril as is likely to baffle the skill and judgment of the best and bravest of nautical men, in order to avert a

common danger; by promptly resorting to the only method of easing and relieving an imperilled ship, in throwing over what will most contribute to that end, whether heavy or light, cheap or valuable goods.

And whatever is thus parted with for the common benefit and safety must be made good by what is preserved by reason of the jettison; in other words, merchandise remaining safe, after other goods have been cast overboard, are subject to contribution for the amount thus lost, in proportion to their value.

And this, in insurance and maritime law, is what is commonly understood and designated by the expression, general average.

It may be defined to be a general contribution, levied on all, to make good an individual loss, by a jettison, voluntarily but necessarily incurred, to secure and preserve other's goods on board from destruction by wreck or other sea-peril; that is, the portion sacrificed is entitled to remuneration from the remnant saved.

This proposition, thus stated, seems to be sufficiently comprehensive to truly define general average, as it has, in jettison cases, been judicially tested, technically treated, or historically traced.

The principle upon which it rests is one of highest antiquity; and is really but a manifestation of an instinct of human nature, put verbally into a legal formula.

Self-preservation is a law of our being. Whatever is essential to man's personal safety, man will instinctively find a mode and means of doing, and give a reason for it; and thus, this instinct has ultimately become formally incorporated into the municipal law of society and nations.

The only fragment of the Rhodian law (the oldest maritime code now known), embraces the principle, and has furnished the doctrine of general average to all the most enlightened maritime nations of the world; and this fragmentary relic of the Rhodian law could hardly have survived the wreck of time, in any authentic form, had it not been by Justinian incorporated into the Roman Code (Dig. 14, 2); and so permanently preserved.

"Rhodiâ lege cavetur, omnium contributione sarcia-
tur, quod pro omnibus datum est."

"Æquissimum enim est commune detrimentum,
fieri eorum, qui propter amissas res aliorum, consecuti
sunt ut merces suas salvas habuerunt." — Dig. 14, 2-5.

And the principle is, that whatever is bestowed for the benefit of all, shall, by a general contribution of all, be made good by all; while the reason assigned is, that it is eminently just, that the loss should be common to all such as, through others' losses, have succeeded in saving their own goods or portions of them.

Whether both the principle and the reason for it are taken from the Rhodian law, may admit of doubt; at all events, the former certainly is, while the latter may have been the gratuitous commentary or interpolation of Justinian.

Lord Tenterden (when plain Mr. Abbott), in the text of Abbott on Shipping (p. 476), and before him, Emerigon (ch. 12, § 40), both refer to the 12th Ode of Juvenal on Shipwreck; in which the poet, addressing his friend Corvinus, happily and classically gives expression to the principle of jettison as well as its practical application.

The vessel bearing Catullus, during a storm, became so water-logged, her mast giving away, and the hull

rolling from side to side, that the pilot became baffled, and his experience and nautical skill was rendered unavailing; the gale and dangers still increasing, when Juvenal makes Catullus to exclaim in his trepidation and solicitude for life, thus : —

“ Fundite quæ mea sunt, dicebat, cuncta, Catullus ;
Præcipitare volens etiam, pulcherrima, vestem
Purpuream.
Atque alias.”

The sentiment, so elegantly expressed (in an ode not deemed the Poet's best), is but a transcript of nature, and its instinctive promptings, from panic in time of personal peril; and the Rhodians, the oldest of known navigators and maritime legislators, made this instinct the basis of their rule of law in regulating cases of jettison; and the rule was accordingly adopted by Justinian and embodied in the Roman Code, under the article “De Jactu,” and has now become a part and parcel of the maritime law not only of Continental Europe, but of England and the United States also.

The essential elements, therefore, of general average claims are threefold :

I. There must be a common danger, rendering a jettison necessary.

II. There must be an actual throwing overboard of goods, to avert or avoid the common danger, and

III. There must be a result indicating that the jettison necessary was potential and instrumental in averting the common danger; and did actually produce the consequent rescue or escape from further peril of the ship, cargo, or crew.

And the presence of these elements, common danger, voluntary sacrifice, and consequent security furnish all the legal ingredients for a general average claim;

though a recognized qualification to this general doctrine may be found in cases of improper stowage; also in losses of timber, thrown from the deck of the deal ships from British North America, when there is no proof of any existing custom so to lade these ships, and a knowledge of such custom is not brought home directly to the ship-owners.

The cases on this subject usually referred to, exhibit many nice distinctions and sharp criticisms; but, on the whole, are reconcilable with the general statement of the rules already laid down.

If the loss be not necessary, or were not voluntary, or did not contribute to the general security, the legal foundation for a general average claim is clearly wanting; for then the asserted loss would be not only no sacrifice, but has proved to be entirely unavailing and superfluous.

The premeditated sacrifice of part must be made with the design to preserve the residue; and if such be the effect, and a general or partial preservation is contingently produced by the partial sacrifice, so designed and made, the preserved property remaining is liable for contribution to make good the portion voluntarily sacrificed.

The qualifications and exceptions to the general doctrine of general average are precise and various.

The loss must be voluntary, incurred by the agency of man in extreme peril, and not caused by any ordinary sea-peril, or springing from any groundless panic. The goods must be thrown and not washed overboard; the jettison, to be sufficient ground for a contribution, must be premeditated and not accidental.

All writers agree in these qualifications generally.

But in regard to certain exceptional cases, the foreign jurists are not in harmony. They differ especially as to the merit of general average claims, where there has been an intentional stranding of the vessel to save cargo, crew, and freight, or either.

In the books and cases, it is termed a voluntary stranding. Still, this even must be under such compulsion from storm, enemy, or pirates as to render it hardly a voluntary stranding.

Not only is there conflict among the maritime writers of Europe but also among eminent jurists in the United States.

The United States Supreme Court follows "without hesitation the doctrine, as well founded in authority and supported by principle, that a voluntary stranding of the ship, followed by a total loss of the ship, but with a saving of the cargo, constitute, when designed for the common safety, a clear case of general average."

And this conclusion was pronounced by Mr. Justice Story for the court in the case of the *Columbian Insurance Company v. Ashby et al.* (13 Pet. 331); directly overruling the decision of C. J. Kent in the case of *Bradhurst v. Columbian Insurance Company*, in 9 Johns. Rep. 9; and affirming or concurring in that of Mr. J. Washington in *Case v. Reilly* (3 Wash. C. C. 298); and of the Supreme Court of Pennsylvania, in *Sims v. Gurney* (4 Binn. 513); and *Gray v. Waln* (2 Serg. & Rawle, 229).

This doctrine is sustained by Bynkershoek, Jacobson, Valin, Voet, Browne, and others in Europe, and opposed by Emerigon, Stevens, and Huberus. The doubt arises from the expression, "*Salvâ navi*," occurring in Emerigon's comments on the Digest of the Romans.

While the safety of the ship is made by Emerigon and his school essential to a general average claim, jurists of different opinions deem the claim to be well founded in the maritime law, whether there be a total or partial destruction of the ship, provided such loss was voluntarily incurred, with the design to promote the common benefit.

The case in 13 Peters, 331, was decided in 1839. It came before the court on a special verdict in error from the circuit court for (Alexandria in the District of Columbia) the Fourth Circuit.

The jury found that the Brig Hope sailed for Barbadoes from Alexandria, May 27, 1825; that, going down the Chesapeake Bay, such was the weather, that the captain came to anchor; finally dropping all three anchors, best bower, small bower and kedge; that the gale increasing to almost a hurricane, the vessel "ripped up the windlass, parted chain cable," and drifted with the scope of both cables paid out; struck and thumped on the shoals, swung around broadside to the wind and heavy sea; and in this situation, for the safety of the crew and preservation of the vessel and cargo, the captain ran the vessel on the bank; where, after the storm, she was left high and dry, it not being practicable to get her off.

The cargo was saved; the vessel, valued at \$3,000, was sold for \$256.40; and the question was, Should the saved portion of the cargo contribute to make good the lost portion of the ship?

The discussion was full and ample; and the court, in giving its opinion, fully but succinctly reviewed the leading opinions of the foreign jurists and the adjudged cases in the United States; and thence concluded that

the weight of authority was decidedly in favor of the present claim for general average.

The case in 9 Johns. 9, and the reasoning of C. J. Kent, are critically examined by Mr. Justice Story, who says: "Upon principle, therefore, we cannot say that we are satisfied that the doctrine of the Supreme Court of New York can be maintained; for the general principle certainly is, that whatever is sacrificed voluntarily for the common good, is to be recompensed by the common contribution of the property benefited thereby."

Other losses or sacrifices than mere jettison (as Emerigon and other European writers seemed to think the Rhodian and Roman law contemplated), may well constitute a ground for contribution in a general average claim; and by the modern practice, the rule is so extended as to embrace loss of ship as well as goods, and also necessary expenses.

Thus, the expenses for repairs in deviating from the direct voyage to enter an intermediate port, to enable the master to prosecute the original voyage to a successful termination, is a good legal foundation for a general average claim.

For temporary repairs to pursue the voyage, the claim may be good, if the damage were itself a subject of general average, but not always. *Power v. Whitmore*, 4 M. & S. 141.

Sometimes it is so for wages during detention; also for provisions; though this has been questioned in *Brown v. Staplyton* (4 Bing. 119), on the ground that they do not fall under the denomination of "*merces*."

So, if masts are cut away, or sails abandoned, for the preservation of the ship (1 East. 220), *Birkley v. Presgrave*; but not, however, if masts and sails are destroyed

in consequence of the necessity of carrying an unusual press of sail. *Power v. Whitmore, supra*, and *Covington v. Roberts*, 2 N. R. 378.

Lost ammunition, expenses of healing the wounded, and injuries to the ship suffered in action, are not to be reimbursed as general average claims. 2 Marsh. 309; *Taylor v. Curtis*, 6 Taunt. 608.

Generally, compensation for general average losses is the price of safety, even if it be only temporary, and not absolute and perfect safety, as by arrival and delivery at the port of destination. *Abbott on Shipping*, 342, 343.

If an impending peril compels and produces a jettison, and this effect shall prove to be the ultimate cause of partial preservation to all, then all must be taxed their contributory share, to repair the individual losses incurred by such sacrifice for the general good.

And this proposition applies also to such losses of goods *jettisoned* as may become the subject of a general average claim; but losses, other than for merchandise cast overboard, are a foundation for remuneration by contribution. There may be a total or partial loss of the ship itself, under circumstances which would entitle the owners fairly and equitably to reimbursement in proportion to the amount of saved property, and perhaps, it should be added, the risk run.

The ship may be sacrificed wholly or in part, by voluntary stranding, for the general good, as well as the whole or a portion of the general cargo. And the principle which protects the one ought also to extend to the other. The nature of the loss is identical, the object and purpose are the same; and the effect of such voluntary sacrifice is in either case the ultimate safety, security, or preservation, and so alike meritorious.

Wherein, then, does there exist any cause for distinction in applying the rule of contribution to sacrificed ship or sacrificed cargo? In principle, there is none. But Emerigon, Huberus, and Stevens are relied on as authorities for the opposite doctrine; and in 1812, C. J. Kent, in *Bradhurst v. Columbian Insurance Company* (9 Johns. 9), adopted and judicially sanctioned the views of these European writers. Yet, in 1839, in the *Columbian Insurance Company v. Ashby et al.* (13 Pet. 331), the United States Supreme Court (as has been stated) overruled this New York case; and since then, the more modern and established practice has been in accordance with the decision in 13 Peters.

How this view of Emerigon became engrafted on the marine law, is only interesting as a speculative question. The subsequent case in (10 How. 270), *Barnard v. Adams*, affirms that of *Columbian Insurance Company v. Ashby*; and in the two cases, Justices Story and Grier seem to have exhausted the subject and the learning thereon. Nevertheless, in *Sims v. Gurney*, C. J. Tilghman makes a suggestion which may furnish a key to explain the text of Emerigon, and is therefore worth following further in detail.

The Pennsylvania Chief Justice comments on Emerigon; and cautions the profession that in the application of the rule of contribution, it must be remembered that the text of Emerigon refers exclusively to goods *jettisoned*, and not to lost ships; so that the phrase "*salva navi*," is merely descriptive of a state or predicament in which goods saved shall contribute for goods lost by jettison; and in no way indicates a precedent condition or requirement upon which alone

contribution may be levied. "Salvâ navi," the ship being safe, part of the goods are sacrificed, but the residue saved. This statement presents simply this question, Shall the remnant saved make good by contribution the part sacrificed?

And that is the only question raised until a reference is ordered for adjusting the *quantum* and stating the account. The practice is uniform, that the ship and freight shall contribute according to their value; and Emerigon pronounces that the goods saved shall also contribute, according to their value, to make remuneration for the goods lost.

It is not then an indispensable condition that the vessel must be safe, in order to exact compensation by way of contribution from goods saved for goods lost; for such compensation is due, whether the ship survive or perish. When, however, the ship is safe, the saved portion of cargo contributes to the sacrificed portion, notwithstanding the ship's safety; if the ship be lost, the same rule prevails; and the cargo sacrificed is made good by contribution of the cargo saved, though the ship be itself lost.

The loss or safety of the ship, therefore, does not at all control the rule for contribution, when applied to cases of jettison; and if not in cases of jettison, why should a different rule prevail in cases of intentional or voluntary stranding? If part of the ship be sacrificed for the common good, the owner is entitled to compensation for such partial loss. If, then, his ship be wholly sacrificed for others' benefit, the ship-owner, in equity, should be no less entitled to contribution to make good his loss of ship. Surely the extent of an owner's security ought not to depend upon the amount of his loss;

otherwise the rule would become, that the greater the loss the less would be the owner's security; and certainly no such rule could long remain inflexible in the maritime courts.

Between the three great mercantile interests of a sea-adventure then, ship, cargo, and freight, no essential distinction can equitably exist, according to the now well-received and recognized rules of maritime jurisprudence in England and the United States. The foreign ordinances differ somewhat, but are not conclusive in controverted matters. Emerigon, as a writer, is deservedly of great authority; yet some of his doctrines have been justly doubted and denied. Stevens, an English writer of practical experience and erudition, has gravely erred, in implicitly adopting questionable portions of the text of Emerigon. And so it has happened, that on some points, there has been a real conflict between leading and learned European writers and American judges; especially has this been so in cases of a voluntary stranding, as it is termed.

The cases decided by Justices Story and Washington, and Chief Justice Tilghman, also by Mr. Justice Grier in *Barnard v. Adams* (10 How. 270), are founded on solid reason, sustained by sound principle, and are now deemed conclusive, as authority in stranding cases in this country; so that whether there be a partial or total loss of ship, her owner is equally entitled to contribution, as would be the owner of freight or cargo, if either be sacrificed for the common benefit and shall thereby produce a partial preservation.

I am inclined, therefore, to adopt, with a single addition, the precise language of the author (in *Hughes on Insurance*, p. 284), for a most correct definition of

general average. He says: "General average signifies the contribution to which the owners of the ship, goods, and freight, become liable *inter se*, on the sacrifice of a part of the ship or cargo, for the preservation of the whole in a case of general danger," but resulting in only a partial damage.

And this not only corresponds with the present known usage at Lloyd's, in England, but also accords with the recognized practice among merchants and insurers at Boston and other principal ports of entry in the United States. With both the private underwriters at Lloyd's, and the American insurers and adjusters in State Street, a liberal policy is deemed the most acceptable course in the adjustment of losses. When the law forbids contribution, other modes of compensation are devised in special cases. Sometimes it is in the form of a pecuniary gratuity; or silver plate; or other appropriate means of signifying to the designated recipient that his useful service, extraordinary effort, hazard, or gallantry has been duly appreciated by those most benefited thereby.

Contribution being made for freight, ship, and cargo, these also in turn become contributory.

I. And the first inquiry arises as to what goods on board ship, constituting cargo, shall be liable to contribution. Whatever is essentially cargo (*merces*), that is, goods shipped for trading purposes, is all positively contributory. The Latin word, *merces* (for which the English word merchandise is a synonym), comprises all goods, which are liable and subject to average contribution. Certain other specific interests are exempt.

Thus, sailor's wages are not contributory, except in

cases of ransom. And such general exemption and the exception also are good policy. By this exceptional regulation a fearless resistance against enemies or pirates may be encouraged and secured. In cases of ransom, therefore, compulsory average contribution from sailor's wages may be the price of safety against capture even; whilst in all other cases, the exemption of wages from contribution tends to secure the utmost efforts of the sailor to effect the general good; and, being sure of his wages, the sailor will not be restrained from exertion by any vague or unreal apprehension of personal loss.

Ship's provisions are also exempt from average contribution. These, for trading purposes, are dead stock; being put on board, not for mercantile exchange, but exclusively for consumption; and, therefore, ought not to become a source of pecuniary profit; or be applied by sale, to furnish the means of purchasing produce for a return cargo even.

Interest on money is not contributory; nor is the wearing apparel of passengers liable to average contribution.

Thus, by enumerating what on shipboard are not contributory, it may readily be perceived what articles are subject to average contribution.

Some articles, not entitled to contribution, may, nevertheless, become liable to contribute. Of this class may be goods laden on deck, whatever be their description.

Improper stowage or careless lading sometimes become important elements in the decision of average cases.

With the few exceptions, already stated, cargo may

comprise any other species of goods, all of which are treated as goods or merchandise, which shall be contributory in cases of general average.

The leading cases are to be found already cited in the text. But for convenience, other cases are collected here. 3 M. & Sel. 482, *Plummer v. Wildman*; 4 Mass. 548, *Padelford v. Boardman*; 6 *ibid.* 125, *Whittredge v. Norris*; 8 *ibid.* 467, *Nickerson v. Tyson*; 14 *ibid.* 74, *Spafford v. Dodge*; 1 Caines, 196, *Maggrath v. Church*; *ibid.* 573, *Leavenworth v. Delafield*; 3 Fairf. 190, *Crockett v. Dodge*; 14 Pick. 13, *Scudder v. Bradford*; 2 Met. 140, *Giles v. Eagle Insurance Company*; Olcott's Rep. 89, *The Ship George*; Ware, 14 & 15, *The Nimrod*; *ibid.* 322, *The Paragon*; 12 Coke, 63, *Mouse's case*; 1 Rob. 289, *The Copenhagen*; 3 *ibid.* 257, *The Gratitude*; 4 Bing. N. C. 134, *Gould v. Oliver*; S. C. 5 Scott, 445; 4 M. & Sel. 141, *Power v. Whitmore*; 3 B. & A. 398, *Butler v. Wildman*; 2 B. & C. 805, *Simonds v. White*; 2 T. R. 407, *Da Costa v. Edmonds*; 4 Whart. 360, *Meech v. Robinson*; 2 Pick. 1, *Bedford Insurance Company v. Parker*; 21 *ibid.* 456, *Orrock v. Commercial Insurance Company*; 22 *ibid.* 197, *Reynolds v. Ocean Insurance Company*; 8 Johns. 307, *Barker v. Phoenix Insurance Company*; 11 *ibid.* 85, *Heyleger v. New York Fireman's Insurance Company*; 14 *ibid.* 138, *Salters v. Ocean Insurance Company*; 4 Taunt. 123, *Price v. Noble*; 6 *ibid.* 608, *Taylor v. Curtis*.

These citations, and the cases referred to in them, with the other references already made in the text, will enable the diligent student to explore the whole subject of general average.

II. A second inquiry arises, For what is contribution

to be made? And here it may not be inappropriate to notice that the books generally refer to two kinds of jettison: regular and irregular.

Regular jettison occurs where there has been deliberation and previous consultation with the officers, crew, or merchant, if on board, by the master. This premeditation may be useful to repel any suspicion of imprudence or rashness on the part of the master. But Mr. Justice Story (13 Peters, *supra*,) repudiates the idea that it is necessary; for, after all, it must mainly depend on the master's judgment; and he is ultimately responsible for any mistake or error in such proceeding. To hold too strictly to forms would not only embarrass a master but might materially defeat the purpose of a jettison, in time of great peril.

And so, on the other hand, irregular jettison is where there has been no previous consultation; but where all was done by the order of a master, acting upon his own judgment, and doing what he deemed most prudent and beneficial to all concerned. And under this class may be found all the principal cases of jettison which have been heard or argued in the English or American courts. Indeed, the distinction between regular and irregular jettison, though recognized by the text-writers, is scholastic and rather shadowy than useful. For practical purposes indeed, it has been pronounced (by Targa, the Genoese magistrate, of sixty years' experience in maritime courts), as substantially prejudicial. That judge gives it, as the result of his long service, that he had never known but four or five cases of a regular jettison, and those, from their very formality, gave rise to suspicion.

If, then, this distinction has not been abolished, might it not be just as well to acquiesce in the *dictum* of the Supreme Court in 13 Peters, *supra*, that "the rule of consulting the crew is rather founded in prudence, in order to avoid dispute, than in necessity"?

To return, then, to our second inquiry, the damages, losses, and expenses which become objects of contribution, are sacrifices of ship or cargo, part or the whole, voluntarily incurred in time of peril, for the common benefit and producing partial or general security from further actual or apprehended damage.

In such case, the sacrifice so made should be restored by a common contribution from all: "*Omnes conferre debent.*" And the loss or gain should be equally shared by all having property at hazard; for "*Nemo debet locupletari aliena jactura.*" And this is a clear, just, and well-established principle in maritime jurisprudence.

III. The third inquiry is, as to the mode of adjusting general average losses. The practice by underwriters at Lloyd's, in England, and the usage of merchants, adjusters, and insurers, in the United States, is now well known in all commercial countries.

During the first part of the present century, more has been effected by courts, to settle the principles of maritime and insurance law, than in all previous periods of history. So much, indeed, has a knowledge of these departments of law been advanced and extended, that the diligent student, by consulting the cases adjudged, and the text-writers, with care, may safely arrive at a sound conclusion as to what the law now is; notwithstanding the conflict, known to have heretofore existed, among writers and judges on this subject of general average, as well as that of salvage.

The establishment of the coffee-house (known as Lloyd's) in England, and the wisely managed insurance companies of America, in employing intelligent brokers or adjusters, who have made the business of adjusting losses a specialty, have doubtless materially facilitated the progress of this peculiar legal science and greatly extended the study and knowledge thereof.

In London, marine assurance is a great business ; differing from other branches in this, that, save what is done by established corporations, it is chiefly carried on by private parties (called underwriters), who congregate at Lloyd's, as their head-quarters. Their association, originally voluntary, has now become a widely extended and useful organization. At all principal sea-ports, there is a resident agent of Lloyd's to take charge of wrecks and give information of shipping movements, to be published in Lloyd's List daily. Lloyd's Register contains a statement of all British or foreign shipping, to be assured by them ; and the association keep regular records of ship-news, accessible to its members. Insurable ships are classified as A 1, etc., by the society and its local surveyors, at different sea-ports. The direction of the affairs of this society is confided to a committee in London of twenty-four members, consisting of merchants, ship-owners, and underwriters. This committee is a shifting body, changed by rotation ; a portion of its members being retired annually. But the association is nevertheless in high repute in the commercial world.

With this agency, and the intelligence of American insurers, the business of adjusting average and other marine losses has become well known and understood ; and the mode of adjustment rendered easy through the

labors of the special experts employed in State Street and elsewhere for this purpose.

Emerigon, Stevens, Benecke, Abbott, Kent, Parsons, Flanders, and others, give instances of their mode of adjusting general average losses; and in the case of *Padelford v. Boardman* (4 Mass. 555), a practical illustration may be found. But, perhaps, I may not better serve the student than by citing leading cases, and subjoining two or three recognized and well-established examples of adjustment, in arithmetical form, selecting only such cases as have at some period been doubted, controverted, denied, or much discussed and considered by persons presumed competent to the task.

Such are the cases of intentional or voluntary stranding, adjustment at foreign ports, wages, provisions consumed, ammunition expended, and expense of repairs and refitting at an intermediate port or port of refuge or distress.

My selections will be confined to New York and Massachusetts in this country, barely referring to the supposed case in England, whereby the learned author of *Abbott on Shipping* illustrated the doctrines contained in his text at the early period of its first publication. Other hypothetical cases may be resorted to for illustrating the principles in the adjudged cases to be applied to practical adjustments.

I. In 1808 (4 Mass. *supra*), the average produced was as follows : —

Vessel valued at	.	.	.	\$4,000.00
Cargo, "	.	.	.	2,300.00
Freight "	.	.	.	750.00
				<hr/>
				\$7,050.00

Partial Loss chargeable to Vessel, namely :

Rigging . . .	\$45.00
Sails and making . .	100.00
Masts	69.57
Spunyarn	19,87 — \$234.44
Deduction on new materials $\frac{1}{2}$. . .	78.14
	<hr/>
	\$156.30

General Average to be adjusted by contribution, namely :

Pilotage, \$40; Entry, \$3.50; Harbor master, \$1.25	\$44.75
Surveys, \$13.98; Wharfage, \$19.50; Small stores, \$6.11 . . .	39.59
Notary, \$9.92; Provisions, \$30; Wages, \$100; Commissions, \$20.93	160.85
	<hr/>
	\$245.19

As \$7050 : \$245.19 : :	\$4000 : \$139.11
4000 : 139.11 : :	100 : 3.48

II. Another instance is an hypothetical case of general average adjustment put in the text of Abbott on Shipping (p. 506 or 608 of the later edition). A ship, bound for Hull, is compelled in the Downs to cut her cable; then struck the Goodwin Sands, which forced the captain to cut away his mast, and jettison part of the cargo; and in so doing, other portions of the cargo were damaged.

<i>Amount of Losses.</i>		<i>Value of Articles to contribute.</i>	
Goods cast overboard . . .	£500	Goods of A cast overboard	£500 50
Goods of B damaged by jettison	200	Sound value of the goods of	
Freight of goods cast overboard	100	B, deducting freight and	
Price of new cable, anchor, and		charges	1,000 100
mast 300	200	Goods of C	500 50
Deduct one third 100		" " D	2,000 200
Expense of bringing ship off Sands	50	" " E	5,000 500
Pilotage, port duties, and commis-		Value of the ship	2,000 200
sions 100		Clear freight, deducting wa-	
Expenses in port 25		ges, victuals, etc. . . .	800 80
Adjusting average 4			<hr/>
Postage 1			£11,800
	<hr/>		
Total of losses	£1,180		
As then £11,800 : 1180 : 100 : 10			

Hence it appears that each person interested will contribute 10 per cent. toward the whole loss.

III. A third statement is taken from 8 Law Rep. 366.

Statement of General Average Case of the Ship George.

Nett proceeds of cargo saved, received by Messrs. Josiah Macy & Sons			\$14,046.59
Less commissions charged by them, 2½ per cent.			815.16
			<hr/>
			\$13,731.43
Nett proceeds of hull and materials			466.95
<i>Loss on Vessel, Cargo and Freight, by the voluntary stranding, to be accounted for:</i>			
Vessel valued at			\$12,000.00
Off, for wear and tear one fifth			2,400.00
			<hr/>
			\$9,600.00
Less nett proceeds.			466.95
			<hr/>
			\$9,133.05
Cargo lost, as agreed by the parties			38,795.57
Freight valued at			6,800.00
Adjustments of the average			100.00
			<hr/>
General average			\$54,828.62

Contributory Interest.

Vessel, amount contributed for		\$9,133.05	
Add nett proceeds of sales		466.95	
		<hr/>	
		\$9,600	7,636.40
Cargo, amount contributed for		\$38,795.57	
Add nett proceeds of cargo saved		13,731.43	
		<hr/>	
		52,527	41,783.10
Freight as valued		6,800	5,409.12
		<hr/>	
		\$68,927	54,828.62

SETTLEMENT.

Vessel receives amount contributed for		\$9,133.05	<i>To pay.</i>	<i>To receive.</i>
Less proportion of general average		7,636.40		
		<hr/>		
		\$1,496.65		
Mutual Safety Insurance Company on one third				\$498.89
Jackson Marine " " "				498.89
American " " "				498.88

	<i>To pay.</i>	<i>To receive.</i>
Cargo pays general average . . .	\$41,783.10	
Less amount contributed for . .	38,795.57	
Messrs. Josiah Macy and Sons		\$2,987.53
Freight receives amount contributed for	6,800.00	
Less general average	5,409.12	
	<hr/>	
	\$1,390.88	
Mutual Safety Insurance Company, on \$4,500,		\$920.45
Owners of vessel receive on freight not insured,		
say \$2,300		470.43
Insurance Brokers		100.00
		<hr/>
	\$2,987.53	\$2,987.53
Mutual Safety Insurance Company receive on vessel	\$498.89	
“ “ “ “ on freight	920.45	
		<hr/>
		\$1,419.34

NEW YORK, July 26, 1845.

HENRY W. JOHNSON, Insurance Broker.

In the two former chapters, on collision and salvage, I have studiously forbore to draw liberally, or even to a qualified extent, from those ancient sources of maritime law — the foreign ordinances. Indeed, but little is found, either in the laws of Oleron, Wisbuy, or the Hanse Towns, of sufficient value on these subjects to have justified encumbering the pages of this treatise with exact abstracts or precise verbal extracts from those Codes. As provision is there made only for damage happening to vessels in harbor or at anchor, I shall content myself with a mere reference to articles. As Mr. Justice McLean says (6 McLean, 576, *supra*), “average contribution is the creation of the maritime law, and is founded in the great principles of equity.”

Accordingly in regard to general average, the subject of the present chapter, it is deemed useful to change the plan and extend it. Much of the existing modern

decisions defining, applying, and enforcing the principles of maritime law to subjects of general average, is abstracted almost bodily from the French Ordinance of Louis XIV. and imported into the more recent reports.

When Lord Tenterden wrote his treatise on Shipping, he stated in the text that there were but few adjudications upon the subject. His precise language was, that "the English courts of justice furnish less of authority on this subject than any other branch of maritime law; there being only three reported cases of questions between the parties liable to contribution, in the first instance, and very few of questions between the party so liable and the insurer, from whom indemnity has been sought."

Magens and Park had respectively published their works. And, at the time when this author, then Mr. Charles Abbott, prepared his original preface in January 25, 1802, it sufficiently appeared from all the law and authority accessible to the student or author, that a contributory tax, in cases of wreck, stranding, or jettison, could be levied or assessed upon goods saved, and which thereby became legally subjects of a general average. In its details, this law is chiefly derived from the foreign ordinances, but more particularly from that of Louis XIV. The laws of Oleron and Wisbuy supply but a moderate portion of the general law. That portion will be found in "les articles 8 et 9 des Jugemens d'Oleron," and "les articles 20, 21 et 38 de l'Ordonnance de Wisbuy."

Valin says, that there is a single article of the French ordinance that is incomparably more exact than all of these five articles together; they only providing, in substance, that, if the master wish it, jettison is allowable

upon the consent of one third part of the crew, first obtained.

The article to which Valin refers is Art. 1, Book 3, Title 8, and may be thus translated :—

“ART. 1. If by tempest, pursuit of enemies or pirates, the master shall feel compelled to cast into the sea a portion of his cargo, cut or carry away his masts, or leave his anchors, he shall thereupon take counsel of the shippers and chief men of the crew.”¹

There are twenty-one other articles in Book 3, Title 8; a translation of which I will here insert.

“ART. 2. In case of diversity of opinion, that of the master and crew shall be followed.

ART. 3. Ship's implements, and other articles least needed, the more bulky and less expensive, shall be first jettisoned, and then the goods on the upper deck; the whole, however, at the captain's election and by the crew's counsel.

ART. 4. The clerk, or whoever acts as such, shall enter upon record, as soon as possible, the consultation, and cause it to be subscribed by such as gave counsel, or if not, then state the reason for not subscribing; and if practicable, he shall keep a complete memorandum of the effects jettisoned or damaged.

ART. 5. At the first port of stopping, the master shall declare on oath before the judge of admiralty, if any, if not before the judge ordinary, the reason for making the jettison, cutting or carrying away his masts, or leav-

¹ The original is as follows:—“Article Premier. Si, par tempête, ou par chasse d'ennemis ou de pirates, le maître se croit obligé de jeter en mer partie de son chargement, de couper ou forcer ses mâts, ou d'abandonner ses ancres, il en prendra l'avis des marchands et des principaux de l'équipage.”

ing his anchors ; and if he stop at a foreign port, he shall make affidavit or protest before the French consul.

ART. 6. An account of the loss and damage shall be carefully made out by the master, at the ship's port of discharge ; and the goods jettisoned or salved shall be appraised according to the price current of that port.

ART. 7. The assessment for paying the loss and damage shall be levied upon the salved and jettisoned goods, and one moiety of the ship and freight, at so much the pound of their value.

ART. 8. In order to judge of the quality of the articles jettisoned, the bills of lading as well as the invoices should be exhibited.

ART. 9. If any goods have been covered up in the bills of lading, and are found to be of greater value than should appear by the shipping agent's representation, they must, if saved, contribute at the rate of their actual value ; and, if lost, they shall be paid for only at the rate of the bill of lading.

ART. 10. On the contrary, if the goods be found of quality less valuable and are saved, they are to contribute according to the sworn declaration ; but if jettisoned or damaged, then they shall only be paid for at the rate of their value.

ART. 11. Neither ship's munitions, supplies, nor sailor's wages nor clothes shall contribute for jettison ; nevertheless, whatever of these articles are jettisoned shall be satisfied by contribution from all other articles.

ART. 12. Goods without bills of lading shall not be paid for, if jettisoned ; and, if salved, shall not be relieved from contribution.

ART. 13. Nor can contribution be exacted to pay for deck goods, whether jettisoned or damaged by jettison :

reserving to the owner process against the master ; but still they shall contribute, if saved.

ART. 14. There should not be further contribution, by reason of injury happening to the ship, unless it were done expressly to promote a jettison.

ART. 15. Unless jettison save the ship, there will be no occasion for contribution ; and cargo, saved from the wreck, will be liable neither to pay for nor indemnify what is jettisoned or damaged.

ART. 16. But if the ship, being saved by jettison, pursue her course and is subsequently lost, what is saved from the wreck should contribute to the jettison according to its value, as found, less the salvage expenses.

ART. 17. Jettisoned goods shall not in any case contribute to pay the damage happening to saved goods, subsequent to the jettison, nor cargo to the payment for a lost, broken, or bilged ship.

ART. 18. If, however, the ship has been opened, after consultation with the chief of the crew and agents, if any, for the purpose of removing cargo ; in that case, it shall contribute to replace the damage done to the ship by its removal.

ART. 19. In case of loss of cargo, when put into lighters to relieve a ship on entering any port or river, assessment therefor shall be levied on the ship and the entire cargo.

ART. 20. But should the ship perish with the residue of her cargo, there shall be no assessment levied upon the goods put into lighters, though they arrive safely in port.

ART. 21. If any owners of goods, liable to contribution, should omit to pay their proportions, the master, for the security of such contribution, may hold on and

cause their goods to be sold, by a magistrate's authority, even to the extent of their several proportions.

ART. 22. If goods jettisoned be recovered, subsequent to the assessment, by their owners, they shall be liable to restore to the master and others interested, so much as they shall have received by way of contribution, less the damage actually suffered by the jettison, and expense of recovery."

And these twenty-two articles of the French ordinance are here inserted for the special convenience of all having occasion to refer to Title 8: "Du jet et de la contribution." From these articles may be fairly deduced the following general proposition as just and sound.

If any sea-peril necessitate an act of jettison, and such act shall produce or contribute to produce a partial preservation of goodsunjettisoned, then these latter goods may be assessed or taxed respectively their contributory share or tax toward repairing the damage and indemnifying individuals for losses thus incurred by jettison for the general benefit of all.

It will be observed that some of these articles supply the entire substance of many modern decisions; while others are more or less modified and qualified to adapt them to the doctrines and *dicta* of those decisions. Many would be reluctant to accept in its literal and precise terms, the entire of Article 15, of the foregoing abstract; and jurists, administering the law, certainly would conscientiously discharge their duty by first perusing or re-perusing the Commentary of Valin upon this article, before giving to it a final judicial interpretation.

Other of these articles may demand the like cautious

and guarded preliminary investigation, before being fully accepted as authority.

The foundation of claims for general average is not merely loss of property, but an intentional sacrifice of property. It must be a sacrifice to serve or save. The purpose, in case of jettison, is sufficiently implied without expressing it. When goods, in a sea-peril, are thrown overboard, this sacrifice is made, either for the purpose of relieving or lightening ship, or saving, serving, or rescuing cargo or crew. Accordingly, whenever a jettison has been made, or any occasion has existed for cutting away masts or throwing overboard ship's implements or utensils, the purpose for doing so is implied to be "*removendi communis periculi causâ*," or in the language partially of the Rhodian Law, "*levandæ (servandæ vel salvandæ), navis causâ*."

To remove a common peril, or avert impending danger, jettison is justifiable; and it must be made with that intent and purpose; and when so made, the goods lost are entitled to contribution, and the saved goods become contributory to the general average loss.

Properly speaking, general average, if not a branch of, is akin to insurance law; and it is so identified with those kindred subjects — collision, salvage, and others of which the maritime courts take general cognizance, that it seems not to be inappropriate in this work on admiralty tribunals and proceedings.

The Federal courts in *Cutler v. Rea* (1849), 7 How. 137, had denied jurisdiction, where the process was *in personam* and not *in rem*. But the correctness of that decision was doubted by Mr. Justice Wayne, and afterwards disregarded by Mr. J. McLean; 6 McLean's Rep. 576, *Dike et al. v. The St. Louis*; and finally in a

subsequent case (1856), *Dupont v. Vance*, 19 Pet. 162, it was substantially overruled so far as it may have affected admiralty proceedings *in rem*. And this decision remains unqualified by any subsequent decision of the Supreme Court. The opinion of the court was prepared by Mr. Justice Curtis, and is an able and clear exposition of the rules of pleading in admiralty, declaring that there are no such technical rules of variance and departure in pleading in the admiralty as in the common-law courts, and concluding generally that, "On full consideration, we are of opinion, that when cargo is lawfully jettisoned, its owner has, by maritime law, a lien on the vessel for its contributory share of the general average compensation; and that the owner of the cargo may enforce payment thereof by a proper proceeding *in rem* against the vessel, and against the residue of the cargo, if it has not been delivered."

And this is in harmony with other like decisions in *Olcott's R.* 89, and *S. C. ibid.* 157; *Dike et al. v. The St. Louis*, 6 McLean, 576, already cited; and *Crocker et al. v. Jackson*, 1 Sprague, 143 and note. General average therefore I deem now to be strictly cognizable in admiralty. So that, although most of the cases and much of the discussion on the subject may have occurred formerly in the common-law courts, it has been deemed pertinent and not at all inappropriate to devote a single chapter in the present treatise to this interesting subject.

In 19 Howard, 169, Mr. Justice Curtis, the eminent jurist and precise technical lawyer, in giving the opinion of the court, says: "It would be extraordinary, if the right to a lien were not reciprocal; if it existed in favor of the vessel when sacrifice was made of part or

the whole of its value for preservation of the cargo, and not against the vessel when sacrifice was made of the cargo for preservation of the vessel."

The point decided was, that a proceeding *in rem* lies in admiralty in favor of either the owner of vessel or cargo, where either vessel or cargo has been voluntarily sacrificed for the purpose, and with an intent to preserve that which subsequently remained secure and unsacrificed, whether such remnant consisted of a portion of the cargo or of the vessel itself.

And the decision is the more significant inasmuch as the individual judge who prepared that opinion of the court had previously been of counsel in the case of *Cutler v. Rae*, and expressly declined to argue at Washington against the question of jurisdiction on which the case turned. And this appears still more manifest from the note which Mr. Justice Wayne caused to be inserted in the appendix to 8 Howard, p. 615; together with the very elaborate and able argument of the gentleman who was counsel for Rea, the original libellant in the Massachusetts District Court.

• In the United States then, the claim for general average contribution may at the present day be deemed cognizable in admiralty; certainly in any proper proceeding *in rem*; and it is difficult to perceive why not, if the proceeding be *in personam*, as the rule is general, if not universal, that wherever a lien once attaches it can only be legally discharged in some well-known and recognized mode; and therefore that the admiralty may seize the *rem-subjectam*, whenever within the reach of its process, and whether the thing has been converted or exists in specie. If it have been sold, the arms of admiralty process may reach after and seize it wherever it

may be found ; and especially so, if the proceeds of the sale are within the control or custody of the court or its registrar or clerk.

After the case of *Rea v. Cutler* was decided at Washington, suit was brought in the state court of Massachusetts, in behalf of the owner of the barque *Zamora*, and the court there declined to entertain it, but gave judgment for the defendants. But upon what ground the decision was made, does not distinctly appear ; it may have been out of deference to the action of the Supreme Court at Washington. Upon an inspection however of the record, no papers appear to have been filed ; and therefore no exact information is accessible, except in a note to 1 Pars. Maritime Law, 292, and in the case of *Merethew et al. v. Sampson et al.* 4 Allen, 192. In this last case, a bill in equity was brought for contribution, and a demurrer filed by the defendants ; but this was overruled. And the court there decided, that a claim in behalf of a ship, though totally lost, was in this State maintainable against the owners of cargo. The court, in that case, say that "It is impossible now to say, on what precise ground the case of *Cutler v. Rea*, 1 Pars. Mar. Law, 292, *note*, referred to by the defendants, was decided. From the fact that it was not reported, the inference is, that it turned on a question of fact, and did not involve any new principle of law. It differs, however, from the present case, in the leading fact, that here it appears that an entirely new and different peril from that which threatened the destruction of both vessel and cargo, was elected by the master, when he determined to run the vessel ashore. In *Cutler v. Rea*, there was certainly room for the inference, that the actual

stranding of the vessel was the impending peril, and was the result of the action of the elements only, slightly and inconsiderably modified by voluntary agency.

"The position that no claim can be sustained by the owner of the vessel, where she is totally lost, is not supported by the more recent authorities, and is not reconcilable with sound principle."

And the court cite the *Columbian Insurance Company v. Ashby*, 13 Pet. 331; *Caze v. Reilly*, 3 Wash. 298; 2 Serg. & Rawle, 229, *Gray v. Waln*; 3 Kent, Com. (6th ed.) 239, *note*; and *The Nathaniel Hooper*, 3 Sumn. 542.

Without therefore speculating as to the fact, which was supposed to be possible, whether the ship was lost or there was no voluntary stranding, I am inclined to the belief that in the different decisions upon this point, the State court, in both cases, followed the authority of the United States Court, in the years 1851 and 1862; unless it should appear that a real distinction did exist between the facts of the former and latter case.

The principle on which a claim for general average contribution is practically founded, may be summed up in this expression: Present sacrifice for future security.

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CHAPTER VII.

BOTTOMRY AND RESPONDENTIA.

OF maritime loans, those of Bottomry and Respondentia are in admiralty of a very high and privileged nature. Resorted to only in cases of emergency, loans of this description, fairly made, are usually strictly enforced. They are oftentimes essential to the success of commercial enterprises; and, therefore, it should be deemed good policy by admiralty judges to look upon such contracts as commercially sacred and peculiarly binding upon the parties legally qualified to make them.

The loan on bottomry is made upon the vessel, her keel or bottom, whence its name; that at respondentia may be made on merchandise laden in the vessel, or cargo.

Both are predicated on a marine risk; and under either, the lender may exact a large (or maritime) interest, as in case of loss of the property pledged, his bond, bill of sale, or other bottomry security becomes unavailing. For this risk, his claim for extra interest is recognized, and admissible as not violating the laws against usury, inasmuch as it goes at the same time to pay the lender a premium for insurance as well as interest on his money loaned. The holder of bottomry security always accordingly represents the double character of lender and insurer.

Bottomry bonds may be effected by the master in a foreign port, and by the merchant in a foreign or home port. As agent for the owners, a master can only execute a bond in case of necessity ; as either when he is without funds or credit of his owner, or funds of his own at his command, or having no personal credit in the foreign port. Of course the owner may enter into these contracts either at home or abroad ; as he may unquestionably mortgage his vessel or any other personal property to secure a loan, which he might desire to effect at any time or place. But the master can only do so abroad, and in an emergency.

When a bottomry bond is made by the master in a foreign port, no presumption exists in law, that the needed repairs or supplies could have been procured, upon reasonable terms, by the personal credit of the owner, independent of the act of the master, in hypothecating the ship ; and, therefore, it must appear affirmatively, by evidence *abunde*, that the giver of the bond acted within the scope of a master's authority ; and that the repairs and supplies for which the loan was advanced, were needed to secure a successful prosecution of the voyage, or the ultimate safety and well-being of the ship itself. 1 Wheat. 96, *The Aurora*.

The master is the confidential agent of the owner ; and is so held out to the commercial world by his owner's act of confiding to him the command of his vessel. His employment vests in him, for the time, great and almost absolute authority in the owner's absence ; he is intrusted with momentous interests ; and the law maritime accords to him a wide latitude of discretion on occasions of distress, danger, and embarrassment.

In the exercise of either authority or discretion, thus

conferred upon him, no master should be unmindful of the duties devolved on him by his owner at home, or expected from him by merchants abroad.

Without a necessity, the master, in a foreign port, cannot execute a bottomry bond, bill of sale, or other document, which would be deemed valid by a court of admiralty.

A bottomry bond cannot be given for an antecedent debt; but may be given to secure a loan advanced to cover necessary expenses to complete the voyage, or to preserve the ship.

A master does not act within the scope of his authority, if he procures advances for himself, and not for the owners or their enterprise. He must do it under some constraint of present distress, or of apprehended disaster.

If there be any fraud or collusion in the inception of a bottomry contract, its future execution will not be upheld, and in admiralty it cannot be enforced.

While care and caution are indispensable on the part of the master, diligence and vigilance are also essential on the part of the foreign merchant (be he agent, consignee, or stranger), to make the proper inquiry as to the necessity and intended use of any advances about to be made to the master on bottomry.

The foreign merchant, financier, or broker, by previous investigation, should inform himself of all the circumstances supposed or alleged to make a loan necessary. And if he make the advances desired, he should be vigilant in getting a proper document from the master, containing all proper allegations of distress, risk, vessel, interest, time for payment of principal and interest, and other averments, which may be requisite to

enable a court of admiralty to pronounce for the validity of his bond. Negligence in this respect may be fatal to his future claim at the port of destination, or the home port.

And should fraud in the master, or unfairness in the lender appear, the latter may forfeit all claim to reimbursement of his loan, or other legal rights under his contract.

In these contracts, however, a part may be adjudged invalid, and another portion of them may be pronounced valid. The rule, void in part avoids the whole, does not invariably apply to bottomry contracts; qualified judgments may be rendered, condemning *pro tanto* a contract as partly invalid, and pronouncing for the residue, and this principle is well settled by ample authority, and rests on solid foundations.

If the master may hypothecate the ship, he may, for a like cause, hypothecate the freight. See *The Gratitude*, 3 Rob. 240; *The Zephyr*, 3 Mason, 34; and *The Packet*, *ibid.* 255. And if freight be pledged, the whole freight for the voyage is pledged, and not merely such portion as may be earned from the port of refuge to the port of discharge. *The Zephyr*, 3 Mason, 34.

The lender on bottomry loses his loan if the vessel be lost; or, unless she safely arrives at her port of destination and discharge.

But if the vessel reaches home, or, from her own inherent defect, or the mariner's or master's fraud or fault, or from any peril not enumerated, she is lost, then the loan and marine interest must be restored to the lender by the borrower. 3 Kent, 354. And for this, not only is the property pledged, but the lender

may hold the borrower personally responsible. Ibid. 355, and The Packet in 3 Mason, 255. If, after the principal shall have become due, any delay in its payment occurs, the loan and maritime interest may be consolidated; thus constituting one principal, upon which a common interest is recoverable from the time when the original loan became due, until the time when it is repaid.

In case of non-payment within the prescribed time for payment, it may be enforced by a decree of the Admiralty Court, ordering a sale by the marshal, and from the proceeds, the bottomry bond will first be liquidated; if that be not the only lien on the thing hypothecated, but other and mixed claims are exhibited, they must be so presented, that they may be weighed and considered separately. The Aurora, 1 Wheat. 96; The Packet, 3 Mason, 255.

Should exorbitant maritime interest be reserved or exacted, judicial discretion will be exercised to control, and (if necessary) to reduce the amount. For it is plain that these contracts may be entered into under such circumstances that undue advantage can be taken by an unscrupulous lender, even if the loan be made to the owner himself. The Zodiac, 1 Hagg. 320.

In speaking of hypothecation of ship, freight, or cargo for a loan, the property is said to be pledged as security for the loan; but unlike other liens, these are unaccompanied with any change of possession; that remains the same and continues in the owner; but the lien inheres, coheres, and adheres to the hypothecated thing until the ship's arrival home; unless she be lost by reason of some of the enumerated perils or some inherent defect rendering her unseaworthy, or from some fault or misconduct of the master or mariners.

Bottomry is a species of insurance, more frequently resorted to formerly than at the present day ; for now the works of Emerigon, Park, Marshall, Phillips, Hughs, and other eminent writers, have exhibited insurance not only as a well-recognized branch of law in this commercial age, but also as a system and science of modern jurisprudence. Prior to its being so systematized by these writers, and such magistrates in England and America as Mansfield and Marshall, bottomry contracts were much resorted to, and many cases (since that of the *Gratitudine*, so elaborately discussed by the bar and bench in the early days of Lord Stowell), have been carefully considered and decided, so that now the chief features and leading principles of the law applicable to hypothecations are measurably mastered and made known to the commercial world.

And this is quite desirable, as the contract of bottomry requires no fixed form of instrument for the signature of the borrower ; it varies in different countries, and sometimes in different parts of the same country. Beside, in these contracts, professional aid is not always sought for, but merchants prepare such instruments for themselves. The mould, in which their form is usually cast, varies therefore according to the training of different counting-rooms : some are comprehensive, and embrace all the legal requisites of a bottomry contract, while others may be defective ; valid in part and in other parts invalid ; the admiralty courts usually sustaining and pronouncing for what they can equitably, without actually disregarding any important principle of maritime law.

Perhaps no better brief definition is found than that of Mr. Justice Story, in the case of the *Draco* (2 Sumn.

157), where it is said: "A bottomry bond is a contract for a loan of money on the bottom of a ship, at an extraordinary interest, upon maritime risks to be borne by the lender, for a voyage, or a definite period."

But this, though in itself incomplete, is still excellent so far as it goes. Had there been added the necessity, or exigency, or the circumstances under which and by whom the bond was executed, it would have been still more complete; as that it were given by the master (perhaps consul or agent), if in a foreign port; or the owner if at home, to enable the borrower to prosecute the voyage, or secure for the ship her requisite repairs and supplies.

To constitute a valid contract of bottomry where a large marine interest is reserved, both principal and interest should be put at risk. 11 Pick. 187, *Thorndike v. Stone*; 2 Pet. Adm. 295, *Rucher v. Conyngham*; *ibid.* note, *Wilmer v. Smilax*; 4 Binney, 244, *Jennings v. Insurance Company of Pennsylvania*.

So essential is a marine interest to the real validity of a bottomry loan, that unless it be expressed in the bond, there will arise a legal presumption that such interest is included in the named principal. 1 Paine, 671, *The Sloop Mary*.

In *Reade v. Commercial Insurance Company* (3 Johns. 352), it was decided that in case of necessity, the master might hypothecate his ship as well at the port of destination as at any other foreign port.

In *Selden v. Hendrickson* (1 Brook. 396), C. J. Marshall held, that the master of a ship belonging to Richmond, Virginia, might hypothecate his ship in New York, for money loaned him to make such repairs as were necessary to enable him to pursue the voyage to a successful termination.

But this cannot be done in the port from which the master first sails (Bee, 250, *Sloan v. Ship A. E. I.*; *ibid.* 345, *Turnbull v. The Enterprise*), nor unless in case of great distress and when the master has no other means of relief. *Gilpin*, 457, *Patton v. The Randolph*; Bee, 120, *Tunno v. The Mary*.

And the obligee of the bond must show affirmatively that his advances were necessary to effect the objects of the voyage or secure the safety of the ship. See the cases already cited; and also *The Golden Rose*, Bee, 131; *The Polly*, *ibid.* 157; *The John*, 1 Wash. C. C. 293; *Walden v. Chamberlain*, 3 *ibid.* 290; *Crawford v. William Penn*, *ibid.* 484.

In the *Hannah* (Bee, 348), and the *Santissima Trinidad* (*ibid.* 353), as well as 2 Pet. Adm. 295, *Rucher v. Conyngham*, it has been held, that a bottomry bond to be valid, should be given at a place where neither the owner nor master has personal credit, nor funds at the command of the latter.

If there should be funds in the hands of a resident agent or consignee, resort to hypothecation is inadmissible; and so if advances be procurable in any other way than by executing a bottomry bond, the principal borrowed is not to be burdened with marine interest. See *ubi sup.*, and also *The Packet*, 3 Mason, 255; 1 Wash. C. C. 49, *The Lavinia v. Barclay*; 2 Wash. 148, *Hurry v. Hurry*; and 8 Greenl. 304, *Descadillas et al. v. Harris*.

For prior advances, the master cannot hypothecate his ship. Bee, 339.

But yet, in the *Toiva* (1 Spinks' Rep.), 185, it was held that where a first bond had been given, such first bond might be paid and the amount included in a fresh or second bond; provided it be done during the same

voyage; but the same doctrine would not be held if the new bond should be given in a subsequent voyage.

Consignees may, in certain cases, lend money on a marine interest and take for such loan a valid bottomry bond running to themselves: as where, for instance, being directed by the owner of a ship and cargo to apply the whole proceeds to discharge the owner's engagements, such consignee is not bound to reserve or apply such proceeds to discharge ship's expenses; but may lend his own money therefore on bottomry. 1 Wash. C. C. 49, *Lavinia v. Barclay*.

But, where a consignee is bound to advance freight, due on the cargo, he must first pay such freight, before he can advance money to the owner on marine interest, and secure such loan by bottomry bond. *Ibid.* Still, as a general rule, the master cannot hypothecate in favor of a consignee.

An hypothecation of a vessel, upon maritime risks and at extraordinary interest, draws after it a maritime lien. 2 Sumn. 157, *The Draco*.

A bottomry bond, given by the owner at the home port, with an express pledge as security, is valid; and cognizable in admiralty; even though the money be not advanced for the necessities of the ship, cargo, or voyage. It would be otherwise, where the money has been borrowed by the master, acting in his capacity as master (*ibid.*); for the master can only, *virtute officii*, make a valid bottomry bond, where there exists a marine exigency; requiring such expenditure for supplies or repairs as are essential to enable the vessel to prosecute and complete her contemplated or unfinished voyage; or save the vessel itself from loss, partial or total, and so justifying the payment of a marine interest.

A bond, by the owner to the master, given to secure certain advances and wages due to him, is a valid bottomry obligation, and has been so held. *The Rebecca*, Bee, 151.

Fraud, practised by the borrower or his agents, cannot affect the validity of a bond, unless the lender participate therein. 4 Wash. C. C. 662, *Atlantic Insurance Company v. Conard*.

A valid bond will be upheld, even against a *bond fide* purchaser without notice, if there be no *laches* on the part of the lender. 2 Sumn. 157, *The Draco*.

The validity of an hypothecation is not affected by the master's previous or subsequent irregular conduct toward his owner, if the lender be not privy to it. 8 Pet. 538, *The Virgin*; 2 Pet. Ad. 300, note, *The Smilax*; Bee, 361, *The Santissima Trinidad*.

A clause of sale in a bottomry bond does not destroy its character or operation. 2 Johns. Cas. 250, *Robertson v. U. S. Insurance Company*.

If the value of the ship fall short of the debt, the lender loses the balance, as the master has not the right to pledge the ship and the owner's personal responsibility also. *The Virgin*, *ubi supra*.

Assets will be so marshaled in admiralty, that the proper priorities will be given in favor of shippers against the property of the master and owner. 3 Mason, 255, *The Packet*.

If various demands (only part of which will sustain an hypothecation) are mixed up in the bond, the holder is bound to so exhibit them to the court, that they may be separately considered. 1 Wheat. 107, *The Aurora*.

In such case the bond will be sustained, so far as it is good, but only to that extent; and if the premium

shall appear to be inflamed by extortion, the court will moderate it. The Virgin, and The Packet, *ubi supra*.

Seamen's claims for wages have priority over those of a bottomry bond-holder; and if compelled to pay the wages, such holder has a right to compensation against the borrower. The Virgin, *supra*.

If freight be hypothecated, freight for the whole voyage is thereby meant, and not merely freight for that part of the voyage not performed at the execution of the bond. 3 Mason, 341, The Zephyr.

Admiralty will enforce a bond for repairs of a ship employed as a cartel, even if the repairs be made in an enemy's port, and though the contract therefor be entered into with an alien enemy. Pet. C. C. 106, Crawford v. William Penn.

A holder of a bond may lose his lien by *laches*. Thus, if he permit the ship to make several voyages, without asserting his lien, and executions are levied on her, his lien is lost. 4 Cranch, 328, Blaine v. The Charles Carter.

Many other English and American cases might be cited, affirming substantially doctrines similar to those already laid down; but it will be perhaps sufficient to refer only to those more recent decisions which may seem to enunciate novel or qualified doctrines in regard to the rights and duties of holders of bottomry securities.

There are cases, in which the power of the master to pledge the cargo or sell the ship, is upheld; or an agent may bottomry for his own advances. Some of these are, The Bonaparte, 1 Eng. L. & E. 641; The Catharine, *ibid.* 679; and The Oriental, 2 *ibid.* 546.

In the case of the Bonaparte, the master of a Swed-

ish ship, borrowed in Sweden, of Mr. Toren, the sum of £392 15s. 11d. on bottomry, at a marine interest of £15 per cent., the bond being upon ship, freight, and cargo. The owners of the cargo were English; bail was given in their behalf for the cargo, consisting of iron; and bail was also given for the freight due. No attempt was made by the master to tranship the cargo, and no notice was given to the owners of the cargo; but the shipper, though applied to, refused to advance money. Counsel appeared for the owners of the cargo, but no appearance was made for the ship-owners. The ship was sold, under a decree, for a sum less than that due on the bond. Affirming the ship to be the prior and the cargo the secondary fund, Dr. Lushington pronounced the bond valid against the cargo for any deficiency.

In the case of the *Catharine*, a British ship bottomried by bond, payable on her arrival in an English port, was sold at Bahia, with the consent of the resident English consul, for unseaworthiness. The foreign purchaser repaired her, changed her name, and sent her to England. He had no notice of the bond, at the time of the sale. Dr. Lushington pronounced for the bondholder, finding the sale to be *boná fide*, the lien unre-moved, and that "the bond attached to the very last plank, and the holder might have that sold for his benefit." Thus he reaffirmed the doctrine formerly held by him in the *Dante* (2 W. Rob. 467), and expressly adopted that of Mr. Justice Story, in the *Draco*, 2 Sumn. 157.

It was held in the case of the *Oriental*, that Mr. Miln, though an agent of Mr. Wallace, the owner, might (to secure advances for repairs), take a bottomry bond from the master. The agent disclosed his intention to the

owner; but the owner provided no funds, and it did not appear that either master or owner had credit where the repairs were made. The master, being unable to pay the expenses, advertised for a loan on bottomry, and the agent's offer was the lowest. Under these circumstances, a bond was given, and by the court adjudged valid.

In the case of the *Wave* (4 Eng. L. & E. 589), an agent repaired and corresponded with the owners of ship and cargo, but did not intimate any intention to take a bond for security. Dr. Lushington, May 16, 1851, pronounced this bottomry bond to an agent invalid, upon the ground, that the repairs were ordered, in the first instance, on the owner's personal credit.

There may be cases where a consul as well as master may give a valid bottomry bond. This happened in the case of the *Cynthia*, 20 Eng. L. & E. 623. Her master and officers had been murdered by Mexican mutineers who had brought her into Campeachy; where she was taken possession of by Mr. Shiels, the British consul, "standing *in loco* of the owner himself," who appointed a new master; and for sums advanced to purchase stores and other necessities, the consul gave a bottomry bond with maritime interest; and its validity was contested by a former bond-holder. Dr. Lushington considered it a case *primæ impressionis*; but pronounced in favor of the consul's bond, it being "the duty of a British consul to preserve and protect the property of British owners," and refers to a like opinion expressed by Lord Stowell in the *Zodiac*, 1 Hagg. 320.

In another case of the *Cynthia* (20 Eng. L. & E. 625), a master bottomried his vessel; a subsequent charterer

advanced part of the freight to defray necessary expenses already incurred; and agreed by the charter-party to pay the balance of the freight to the bondholder, in discharge of his bond; and it was adjudged that the bondholder had no claim upon the freight advanced as against the consignee of the cargo and assignee of the freight.

Upon appeal to the judicial committee, the case of the *Bonaparte* (20 Eng. L. & E. 649), came again before Dr. Lushington, upon remit, for insufficient communication to the owners or consignees of the iron; and upon taking additional evidence the same learned admiralty judge held that a letter written by a British consul in a foreign port, on behalf of the master of a small British vessel and his agent, informing the consignees in England of the damage sustained by the ship (but making no application for money nor referring to the necessity for repairs), is sufficient notice for the purpose of raising money on bottomry.

In trials of suits on bottomry bonds, the defense intended to be relied on should be stated in the pleadings.

In 1853, a decision in the case of the *Nuova Loanese* (22 Eng. L. & E. 623), was made by Dr. Lushington, to the effect that advertising for a loan, at the port where a charterer or shipper resides, is not sufficient notice to him, and that a bond so given is not valid against the cargo or owner or consignees thereof.

A Wallachian ship, after encountering violent storms, was found to have sustained much damage, rendering repairs necessary. She arrived at Rio, April 15, 1851, where the master and crew, except the mate and three seamen, died. Battestella, the mate, was appointed mas-

ter, by order of the Ottoman consul. A loan was advertised for, and the owner of the cargo knew it, and also that his cargo had been laden and unladen ; and was well aware of the unseaworthy condition of the ship. But no direct communication or application for funds was made to the owner, and therefore his cargo had not become a subject of hypothecation. Such communication and application were prerequisites ; and the want thereof could not be supplied by advertisement, or other means of publicity. And this was deemed an important rule, which in practice ought to be inflexible.

In 1 Spink's Reports, p. 303 (*Nostra Senora del Carmine*), it was held that the master, though the agent for the owners, can only bind them to the extent of the value of the cargo ; but should the owner contest, he may become personally liable for costs. I cite from the first volume of Spinks ; but presume a second volume has been published, though it has not appeared in this country. The volume from which I cite contains decisions made in the year 1853-54. *Vide* Appendix H.

If the owner of the cargo give bail to the amount of the value of the cargo, and do not appear to contest, he is not liable either for any deficiency after sale, or for costs ; though enough be not realized to liquidate the bond and provide for all the costs. This was so held in 1854, in the case just cited, the *Nostra Senora del Carmine* : also reported in 29 Eng. L. & E. Rep. p. 572.

In the *Royal Arch* (Swab. 269), it was held that the bond of the master, given with the owner's consent, where payment was postponed for a new voyage, was good originally ; but the holder could not sue on the agreement to postpone, nor in admiralty.

A low rate of interest implies the absence of a sea-risk.

In the *William* (ibid. 346), the master, who was also sole owner, gave a bond binding himself, ship, and freight; and it was there decided that he could not claim costs out of the proceeds, or wages against the bond-holder.

In the *Jonathan Goodhue* (ibid. 355), it was held that a bond, executed after the repairs were done and a contract of affreightment was made, but before an actual shipment of the cargo, was not valid.

A sea-risk must be directly expressed; no matter if the lender insures, and the borrower pays a premium; and the expression of a maritime risk is essential to the validity of a bottomry bond. And this expression is to be collected from the terms of the instrument itself. Hence stipulations, excluding an implication of risk, should be avoided, as tending to invalidate the bond; such as stipulating for a common rate of interest; extending its payment until the payment of the principal, or the payment of principal beyond the date of the arrival; insuring the ship by the lender; all which tend to exclude the implication of a veritable sea-risk; and such conclusions are not effectually repelled by a bill of exchange. *Swabey*, 446, *The Indomitable*.

In the *Helgoland* (ibid. 491), a British subject purchased a ship abroad and gave a bond for her outfit. It was held cognizable in admiralty. If there were a mortgage, the bond-holder is not bound to make known the existence of his bond to the mortgagee, nor is it affected by the owner's concealment of it. Nor is the mortgagee affected by the *laches* of the holder, unless specially prejudiced thereby; nor, if the bond is originally good, is it affected by the holder's agreement to purchase.

In the *Edmund* (*Lushington's Rep.* 57), it was decided

that the master might execute a valid bond only for repairs and necessities for the home voyage, but not for charges on the outward voyage, and previously incurred.

In the *Olivia* (Lush. 484), the decision was in 1861, that when practicable, it was the master's duty to communicate with the owner. In the *North Star* (ibid. 45), a bond for general average was pronounced against as invalid. In the *Kepler* (ibid. 201), the bond was deemed valid, and referred to the registrar and merchants, by whom the costs of reference were allowed, but other costs disallowed. See also *The Edmund*, ibid. 211.

As to interest, where the premium is excessive, the court will refer it to the registrar. Lush. 24, *The Huntley*.

And if in the bond blanks are left to be filled as by agreement, the filling up will not be allowed by the court, but the usual interest is to be found by the registrar. Swab. 240, *The Change*.

As to commissions, only reasonable commissions are allowable. Swab. 177, *The Roderick Dhu*.

And where excessive commissions at St. Thomas were claimed, the claim was disallowed, and referred to the registrar. Lush. 115, *The Glenmavera*.

There are several cases in the first and second parts of *Browning and Lushington*, and the promised third part will, when published, include all the English decisions previous to November 1865. At this date, October 19, 1867, it has not been received in the United States.

In the first case (the *Glenburn*, *Brown. & Lush.* 62), the court refused to rescind a decree, pronouncing a bond valid, and consented to by a defendant, though the facts, according to a subsequent decision in the

Hamburg (Brown. & Lush. 253), might possibly raise a valid defense; the refusal to rescind was upon the ground that such defendant was in adequate possession of the facts when he consented to the default.

In the *Gem of the Nith* (Brown. & Lush. 72), the holder of a bond on ship, freight, and cargo, was held entitled upon default, to full freight, when the cargo was delivered to him, to satisfy the sum secured by his bond, with costs; and that the owner of the cargo has no right to demand a reference, although the master had sold part of the cargo before the bond was executed, and had applied the proceeds to the ship's expenses.

In the *Cargo ex Galam* (ibid. 167), a court of admiralty was held bound to recognize a possessory lien for freight and general average; and the relative rights of ship-owners and shippers of cargo, right of detention for transshipping, and original parties in admiralty, are considered by Lord Kingsdown.

The *Serafina* (ibid. 277) was a Prussian bark, whose captain had given a bond for insurance premiums. Held, invalid.

In the *Laurel* (ibid. 317), a bottomry bond was upheld, wherein was expressed a maritime risk, though it did not contain any express provision for maritime interest. Although an advertisement is proper, yet a bond may be valid without it, previous to taking advances on bottomry. This, and S. C. p. 191, relates to liens growing out of transactions upon personal credit and in a port of refuge.

In the *Hamburg* (ibid. 253), it was held that the master is not obliged to tranship cargo, if, at the port of distress, the means for repairing are procurable.

The validity of a bond, payable in England, is triable

by the general maritime law, as there administered, and not by the law of the ship's flag, or the *lex loci* where the bond was executed.

The master is agent for the owners, *ex necessitate rei*. But he cannot hypothecate cargo, if communication be practicable with the owners. The *Bonaparte*, 8 Moore, P. C. 459, explained.

Bottomry and hypothecation securities, then, are convenient commercial contracts, giving to the master generally (and in some exceptional cases to the agent or resident consul), the power to procure, in time of distress, the necessary funds to enable him to pursue and complete the owner's commercial enterprise.

Without some such expedient or power, many a marine undertaking might signally fail. The exigencies of commerce have long recognized the utility of these instruments, as well as the wisdom and policy of conferring upon the master the power of legally executing them when in a foreign port, remote from home and not within communicating distance with his owner.

Under such circumstances, the law implies that the master may borrow on bottomry to secure the loan so advanced.

A proper exigency however must exist for the exercise of such power, and its exercise may be justified when a pressing necessity therefor exists.

First. Where repairs or supplies are actually needed for the safety of the ship or prosecution of the voyage.

Second. The master must be without funds of his own or his owners.

Third. He must be unable to procure funds, on his own personal credit, or that of his owner, at the port of necessity.

Fourth. If consigned, he must be unable to get advances from, or through his consignee.

Fifth. The funds must be obtained by the master, without fraud or collusion with the lender or consignee, but with absolute good faith on his part; and with the view either to save the voyage or prosecute the voyage.

Sixth. The lender must inform himself of the circumstances and exigency requiring resort to a marine loan, and —

Finally. Resort to bottomry is only admissible when no other resource or expedient seems promising or practicable.

In all bottomry bonds, an extra or maritime interest is permissible; and the absence of it renders the transaction suspicious.

These securities may be given and negotiated by the owner, the master, or his temporary substitute; or in case of death or disaster, by the resident foreign consul of the country to which the vessel belongs.

Many of the English and American cases to be referred to will be found in the text preceding; but other more recent authorities may be cited from 1 Eccl. & Adm. Reports, which contain English decisions from 1865 to 1867, being a regular series of reports from Browning and Lushington.

In the *Mary Ann* (1 Eccl. & Adm. Rep. 13), it was held, that transactions between the owner and mortgagee of the vessel, which might render the voyage illegal, could not invalidate a bottomry bond, given by the master to a *boni fide* lender, who has only to look to the facts —

1. That the ship is in distress;
2. That the master has no credit; and

3. That the money to be loaned is required for necessary purposes.

In the *Cornelia Henrietta* (ibid. 51), that where bond-holders advance mariner's wages, no repayment will be sanctioned by the Admiralty Court, unless upon appropriate application made to it therefor.

But in the *Fair Haven* (ibid. 67), it was held, that bond-holders might in some instances pay prior charges, and repayment for small amounts would be allowed.

In the *Edward Oliver* (ibid. 379), the master was deemed entitled to precedence, and had priority over the claims of the holders of bottomry bonds.

As to priority in general, there are several aspects in which it may be viewed in reference to persons and property. As has just been seen, a master has priority over a bond-holder; the seamen also have a lien for their wages, which is to be preferred to all other liens, even those of lenders on bottomry; and the holder of a bottomry, which is latest in time, generally has priority over all other holders of bonds, which are of a prior date.

The reason for these distinctions are, that no bonds would avail lenders on bottomry unless the mariner could be protected and assured of his wages, without the apprehension of losing them by secret hypothecs or mortgages on the vessel; and no subsequent loan could be negotiated, however great the distress and urgent the necessity, after a first or second loan had been effected, unless the latest lender could be reasonably assured of holding the hypothecated property by a lien, entitled to preference over all other former liens, except that of the seamen for their wages.

There are many English and American authorities

sustaining this doctrine, which accords generally with the principles of all maritime law. Certainly, there may be some exceptions ; and sometimes, the general doctrine has been slightly qualified. Thus, in the *Rhadamanthe* (1 Dods. 204), it was held that the priority of payment, in favor of a subsequent over a prior bond, was a privilege confined to bonds given in a foreign port, and not to be extended to every security which may bind the ship. This privilege or preference springs from an existing, pressing necessity. Without such necessity, the preference ceases, though a bond be formally executed by the master in a foreign port. And two bonds, in this case, were pronounced to be not within the principle of necessity, and therefore, though subsequent in time, were held not entitled to priority of payment over a former bottomry bond.

So, in the *Exeter* (1 Ch. Rob. 176), money was advanced by several parties for the same repairs, upon the same terms and invitation, all parties acting in concert ; but it so happened, that the bond of one of them was dated six days prior to the date of the others. Upon this ground, the party applied for priority of payment, but his application was rejected ; and the court held, that there should be no discrimination, but that all the bonds should be paid *pro rata*, without any preference.

The property (ship, cargo, and freight) to which the lien for securing these bonds attaches, or its proceeds, constitute the assets, out of which payment is to be made. In paying a bottomry bond, therefore, these assets are to be so marshalled that the property of the owner of the ship shall be first applied to that purpose, then the freight, and finally the cargo. The *Romolo*, 8

Irish Jur. 462; *Furniss v. Brig Magoun*, Olcott, 55; *The Dowthorpe*, 2 W. Rob. 74, *et seq.*; *The Packet*, 3 Mason, 255; *The Trident*, 1 W. Rob. 35; *The Priscilla*, Lush. 1; *The Betsey*, 1 Dods. 289; *The Eliza*, 3 Hagg. 89; *The Sidney Cove*, 2 Dods. 1; *The Fortuna*, 5 Irish Jur. (N. S.) 375; and *The Bonaparte*, 3 W. Rob. 302.

To justify a maritime interest, there must be a marine risk to run. Without such a risk being incurred, there could be no legal foundation for an unusual or *extra* interest, to be taken on the loan as stipulated for, in the bottomry bond. This enhanced rate of interest is not inappropriately denominated *pretium periculi*,—the cost of peril, or price of safety. Sometimes it is enormous; especially in times of the existence or apprehension of warlike operations or hostile relations. Fifteen per cent. and more (even thirty-six per cent.), on the amount loaned has been recovered.

At the termination of the risk, the lender is entitled to payment, and there should be no unnecessary delay in enforcing a bottomry bond, without proper explanation. It should be enforced within an equitable period. *The Hercyna*, Stuart's Vice-Adm. Rep. (L. C.) 274.

In enforcing bottomry bonds, the admiralty courts must proceed on principles of equity. *The Cognac*, 2 Hagg. 389.

Merchants, undertaking the agency of a vessel, are obliged to protect the owner against the master's extravagance, dishonesty, or carelessness. *The Royal Stuart*, 2 Spinks, 258.

Other authorities, on risk, interest, apportionment, priority, laches, necessity, and wages, may generally be cited: *Swab*. 346, *The William*; *ibid.* 267, *The Standard*; *ibid.* 473, *The Rajah of China*; *ibid.* 261, *The Janet Wil-*

son; *ibid.* 446, *The Indomitable*; *ibid.* 263, *The Catharine*; Lush. 57, *The Edmund*; *ibid.* 24, *The Huntley*, a case of excessive premium; *ibid.* 545, S. C. p. 578, *The Salacia*; 2 Hagg. 300, *The Duke of Bedford*; 3 Hagg. 78, *The Kennersley Castle*; 2 *ibid.* 53, *The Atlas*; 14 Jur., *The Osmanli*; 1 Curt. 340, *The Brig Ann C. Pratt*; 4 Wash. 662, *The Atlantic Insurance Company v. Conrad*; 18 How. 63, *Carrington v. Pratt*; 9 Johns. 29, *Fontaine v. Columbian Insurance Company*; 11 Pick. 183, *Thorn-dike v. Stone*; 9 Met. 237, *Bray v. Bates*; 3 Mass. 443, *Appleton v. Crowninshield*; and same parties, 8 Mass. 340.

In these two last cases in Massachusetts, there was an early and very elaborate discussion as to the effect of capture in discharging an obligor. Eminent counsel were engaged. On the side of the plaintiff were Messrs. Prescott and Dexter; on that of the defendant Mr. Story. Chief Justice Parsons was formerly of counsel, but having been appointed a member of the court, could not take part in the discussions of 1807, or 1811, either at the bar or on the bench. The court, at both hearings, were divided; and the decision was made by a majority of the judges sitting. The bond was given by Crowninshield to Appleton in 1793, and the final decision was not obtained until the year 1811. Two suits were brought in the State court: in one the defendant prevailed; in the other, the plaintiff prevailed.

The facts were, that a bond, on a loan for a voyage from Salem to the West Indies, was given in 1793 by the defendant to the plaintiff, for \$500, at a maritime interest of three per cent. a month, or at the rate of thirty-six per cent. The schooner *Charming Sally* arrived at

Guadaloupe, discharged cargo, reloaded for the home port, but on her return voyage was captured by a British ship of war, carried into St. Christopher, there libelled, and by the Vice-Admiralty Court condemned. An appeal was taken to the commissioners in England, by whom the former decree of condemnation was reversed, the capture adjudged illegal, and the condemnation irregular. Afterward, under the Jay Treaty of 1794, a restoration was ordered, and full indemnity made to the owner, the present defendant; but the schooner was never specifically returned.

The first suit was debt on the bond. But as the schooner did not return, a majority of the judges sitting sustained the objection made by the defendant's counsel, that this form of action would not lie, as the payment was stipulated, in the specialty, to be made on a contingency, which never happened.

The second suit was *assumpsit* against the defendant to pay over money which he had received, but ought not *ex æquo et bono* to retain; and this action was sustained, and judgment given for the plaintiff in 1811, four years after the decision of the first suit, and eighteen years after the execution of the bond, the original cause of both actions.

This double and protracted litigation was during a period of history when American commerce was seriously menaced; our carrying trade interrupted and jeopardized by the British Orders in Council on the one hand, and the retaliatory action of Napoleon, by his Berlin and Milan decrees, on the other.

But it, moreover, especially developed the early professional zeal, learning, and ability of the sole counsel in court of the defendant; and which qualities, as

then displayed, have subsequently contributed to render the name of Mr. Justice Story so justly conspicuous in his long judicial career. From 1811 to 1845, it may be said, without disparagement to others, that this eminent and experienced magistrate literally adorned the bench of the First Circuit of the United States.

By him were framed the rules regulating the admiralty practice in the United States. The seventeenth, and especially the eighteenth of these rules have a particular reference to the topics discussed in this chapter, and the practical inception of legal proceedings in suits on bottomry bonds.

This eighteenth rule is as follows: —

“In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property in whose-soever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong, lost or subtracted the property, in which latter case, the suit may be *in personam* against the wrongdoer.”

The phrase “properly so called,” is intended to limit the operation of this rule exclusively to these bonds as duly executed specialties, so that it may not, for any reason, be attempted to be extended to those maritime liens contemplated by the seventeenth rule, and are there termed “maritime hypothecations.”

For general convenience I here insert

RULE XVII.

“In all suits against the ship or freight, founded upon a mere maritime hypothecation, either express or implied, of the master for moneys taken up in a foreign port, for supplies or repairs, or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*.”

The effect of this rule is to prescribe a practice for the usual and ordinary maritime contracts, written or unwritten, to which a lien attaches, sometimes called a tacit hypothec, and not to bottomry bonds as such.

Bonds executed to bottomry a ship, or hypothecate cargo or freight, are not to be construed strictly but liberally, so as to carry into effect the intention of the parties. 3 Story, 465, *Pope v. Nickerson*.

The validity of a bond will not be affected by fraud practiced by the borrower or his agent, unless the lender also participate in it. 4 Wash. C. C. 662, *Atlantic Insurance Company v. Conrad*.

If an express contract of bottomry be void for fraud, no recovery can be had upon the footing of an implied contract and lien. 1 Curt. 340, *The Brig Ann C. Pratt*.

Underwriters, to whom an abandonment has been made but not accepted, are not admissible as claimants in a suit *in rem*, on a bottomry bond. 3 Mason, 255, *The Ship Packet*. See also *Regina del Mare*, Eng. Adm. Aug. 2, 1864. S. C. Br. & Lush. 315.

These bonds are said to be of a high and sacred character; and, as they benefit ship-owners and are for the general advantage of commerce, are greatly favored

in admiralty courts. 4 Moore, P. L. 21, *The Prince George*; 5 Ch. Rob. 102, *The Rebecca*; 1 W. Rob. 1, *The Vibilia*; and see 1 Adm. & Eccl. Rep. 8, *The Mary Ann*.

Courts discountenance the sale of bottomry bonds. 3 Hagg. 394, *The Prince of Saxe Coburg*.

A strong leaning exists in the admiralty, as is quite observable, to uphold bottomry contracts; and as strong an indisposition to convert simple contracts or other merely collateral securities into bottomry securities by construction. If the master give, for advances, bills of exchange, and verbally agree to pledge and hold the ship therefor, it could not, by judicial construction, be considered to be an instrument of hypothecation. Abbott on Shipping, 120.

By the eighteenth rule, already referred to, provision is made in the United States, for enforcing bottomry contracts, whether on the vessel, freight, or cargo. When, therefore, proper legal proceedings shall have been instituted for the purpose of enforcing such obligations, the matters relied upon in defense should be presented with formal precision.

To this end, the facts should be well investigated, the pleadings carefully drawn, and the defensive allegations sufficiently brief and plain, to exhibit at once the principal objections to be urged against enforcing the contract.

Several defenses may be set up against the validity of a bottomry bond, when executed by the master, while in a foreign port. Though not clothed generally with authority to execute these maritime securities, at all times or any place, yet the master, *virtute officii*, and as the owner's accredited agent, may exercise this power, when abroad and in a time of exigency, distress

or necessity. He cannot generally execute such contracts in the presence of the owners, though he may in their absence; nor at home, though he may abroad; nor when in the possession of funds, though he may when without funds; nor can he, if the owners have funds at the port of distress within his control or command, or personal credit of which he may readily avail himself; nor will mere advertising for a loan place him in a situation to negotiate for it on bottomry, without communicating with the owner, his agent or consignee, if either be within communicating distance; nor, in fine, unless the loan sought for shall be indispensable to enable the vessel to proceed on, or complete her voyage, and no other mode of raising it shall appear to be feasible.

Beside the restraints just enumerated, which are by law imposed upon the master before he can be justified in exercising discretionary power so vital, the master is, moreover, bound to the strictest honesty and good faith in performing any such official act in foreign ports. The loan, if effected, should be for the ship's and owner's benefit and not for the benefit or accommodation of the master merely. The object and purpose of the loan should be to discharge a liability or debt to be incurred, and not to pay a preëxisting debt; and in no case should there be any fraud or collusive arrangement between the lender and the master.

Any of these requirements may, if disregarded by the master, invalidate a bottomry bond. It is, therefore, imperative upon the lender that he should thoroughly investigate the facts, and, by proper information, be well assured that a necessity exists which may authorize the master to procure a loan, before any money is advanced upon it to the master.

The validity of a bond may be controverted upon the ground of either —

1. Ignorance of the causes of distress, and necessity or occasion of making an hypothecation.
2. Fraud or collusion between the parties.
3. Neglect of the master to communicate with the owners or to consult with their agents or consignees abroad.
4. The absence of an urgent necessity; or —
5. Any irregularity in the course and conduct of a master; and —

For other specific grounds, not here particularly enumerated. And, in all cases, the ground of defense, whatever it may be, should be precisely alleged and distinctly presented in the pleadings.

Upon either of the enumerated grounds of defense already indicated, court and counsel might well take into consideration, either an undue assumption of authority, on the part of the master, in negotiating a loan; or, on the part of the lender, a want of prudence and discretion in undertaking to furnish and advance funds, either on a bottomry of the vessel or hypothecation of the cargo, without proper inquiry or information. Any or all of the suggested defenses would lead to controverting the legality of the bond, in its original inception, or as the product and offspring of a dominant, pressing, urgent and controlling maritime necessity. In every aspect of the investigation, the controversy, so arising, could not fail to be interesting, as it would necessarily involve a wide and varied discussion of the character, origin, nature and effect of all bottomry contracts.

Moreover, the terms and form of these maritime and

commercial contracts may afford specific matter and grounds of defense. Thus, a maritime risk is, theoretically, an indispensable ingredient in a bond given to secure a lender; and the presence of that risk only will justify the bondholder in taking from the borrower an exorbitant maritime interest. In case of the loss of the vessel, the lender loses his loan. Having stipulated for repayment at the termination of the voyage, or upon the safe arrival of the ship at her home port, or port of destination, or port of discharge, as the case may be, the lender, in taking his bond, practically stipulates for the vessel's safe arrival. The presence, therefore, of a marine risk should appear affirmatively and expressly in the written instrument. If it do not so appear, it may render the bond fatally defective. The absence or non-appearance of all risk to be run by the lender, would throw suspicion over the whole transaction, and vitiate the bond. In the *Atlas*, (2 Hagg. 41-65), a bond excluding sea-risk, was adjudged void. In the *Emancipation* (1 W. Rob. 124), it was required that a sea-risk should be expressed in terms, or the bond so formed that a risk might be gathered, by inference, from its language and contents.

If, then, a suit upon a bottomry bond is to be defended upon the ground that the lender run no hazard, did not insure the vessel against loss, capture, or other disaster, by consenting to wait for her safe arrival before demanding payment of loan or marine interest, this ground of objection should be distinctly alleged in the defensive pleading.

So, if a bond were given under duress, proof of actual compulsion would vitiate it. If such a defense were properly pleaded, the bond could not be upheld,

and the obligors must be discharged; not only the master, if he gave the bond, but his principal, the owners, also. 1 W. Rob. 213, *The Heart of Oak*.

So, if money shall have been advanced on personal credit merely; and this fact is intended to be relied upon, in defense, as a fatal infirmity in the transaction, it should be plainly pleaded. 3 Hagg. 412, *The Hersey*; *vide also*, *The Trident* and *The Vibilia*, *supra*.

A want of diligence or *laches*, on the part of a bondholder, in asserting his right or attempting to enforce his lien or claim, would, if seasonably pleaded, be a fatal objection to his recovery. Thus, where an obligee, subsequently to the taking of his bond, suffered a vessel to go several voyages to sea, without enforcing his lien or attempting it, he lost his priority. 4 Cranch, 328, *Blaine v. The Charles Carter*.

Accordingly, whether the validity of a bond is to be contested, or any other legal defense is contemplated, due attention is demanded from the student or practitioner, not only to the pleading but also to the form and terms of the obligation. Such precaution will not be supererogatory; although admiralty courts have been more lenient, and less rigid in adhering to the merely formal rules of pleading and process in the more modern practice of those courts.

If, then, a bottomry bond shall have been executed, under a pressure of necessity, for funds to procure stores, supplies, repairs or necessities, needed to aid in continuing or completing a voyage, which funds, for the want of personal credit of the master and owner, at the port of distress, could not be otherwise obtained, such bond ought to be upheld.

On the other hand, if a bond, not thus surrounded

and wanting these general features, is likely to be contested; it is but just that the court should be seasonably furnished with proper pleadings and ample proof to enable and justify it, in pronouncing against the bond.

This mode of conducting the suit in admiralty courts, would contribute materially to aid them in doing complete justice to all parties, whether appearing there to seek protection against wrong-doers, or to invoke exemption and immunity from the consequences of the judgments, decrees or awards of these courts.

CHAPTER VIII.

MATERIAL-MEN. — NECESSARIES.

In the preceding chapter, the specialty called bottomry bond has been considered in all its varied legal and maritime aspects and bearings. Different maritime codes have applied to this contract a diversity of names. Thus, the French Marine Ordinance has designated it, "*contrats à grosse aventure*," "*contrats à la grosse*," "*ou contrat au retour de voyage*;" while Valin, in his commentary upon the ordinance, Art. 1, Liv. III. Title V., contents himself with the designation, "*Le contrat de Grosse*." In the judgment of Valin, the bottomry bond should be made in writing, and, as the code prescribes, executed with formality in the presence of a notary and signed by the party, "*pardevant notaire ou sur signature privée*." It, therefore, would seem that the several formalities of writing, acknowledgment, signature, and (as some have supposed) sealing, were formerly deemed to be essential prerequisites to a valid execution of a bottomry bond.

But, there are other simple contracts, of a similar character, well known in commerce, but not required to be executed with so much of formality, which yet are made, by the general maritime law or local legislation, equally binding upon ship and ship-owner. I allude to contracts for necessities; which, when entered into by

the master, in a foreign port, as the authorized agent of the owners, for their benefit, and not his own, in a time of distress or necessity, constitute or create a maritime lien, attaching to the ship and binding personally the ship-owner.

These contracts have the effect (and are so designed) to assure and guaranty to a lender repayment of the money paid for repairs or advanced for the ship's use, at the master's request, just as much as do bottomry bonds assure an obligee or holder of this latter instrument. In both, the elements, ingredients, or prerequisites are substantially the same; the security is similar; and, though these simple contracts for repairs and necessities are less formal in their construction and execution, yet both aim at the same common object, the completion or prosecution of a temporarily suspended or interrupted voyage, and are impressed with the like legal effect and character; that is, the ultimate security and repayment of a lender, who shall assume to advance the moneys required for relief. Notwithstanding the absence of all formality, such contracts, when duly made by the master, upon his own or his owner's credit, and as their authorized agent, under the pressure of necessity, for the purpose of continuing or completing the ostensible object of an unfinished maritime adventure, create a tacit hypothec or lien upon the vessel, and are legally obligatory upon the owners personally.

If the legal origin and foundation or commercial purpose of these contracts are thoroughly understood, it will not be difficult to correctly apply the proper principles of a sound maritime jurisprudence to any given or supposable state of facts. Hence, in examining the reported authorities, it may be found that very

little discrepancy in principle is discoverable in them. Though different commercial communities may have differing codes; and the known doctrines of England may have conflicted with the accepted doctrines as recognized in the United States; and though the law in Great Britain, as enacted or administered at different periods of her history, may have been unstable and fluctuating; before the Restoration in 1660, upholding both right and remedy; and afterward, during the reign of Charles II., overthrowing, through the instrumentalities of the common law courts and House of Lords, right, remedy and implied lien for repairs or necessities furnished, — still, in the decisions, there is, at the present day, a general concurrence in doctrine and principle. In those countries where the civil law prevails, there has been constant uniformity. In the United States, there has also been a steady adherence to the principles of the general maritime law on this subject: and no legislation has been deemed necessary here, unless it be in reference to domestic vessels. But England not only legislated upon the subject in the time of Charles II., but of George I.; and several times during the reign of its present sovereign, in 1840 and 1861. Whatever may have been the prohibitions by courts or legislatures upon this subject hitherto, at the present time, all enactments in England and the United States, as well as the decisions now received as authorities, are in general harmony, especially as they affect the extent and character of a master's power and authority, in a foreign port.

The master, it is now generally conceded, under his implied power may hypothecate ship, freight, or cargo, or a portion thereof; or, in a foreign port, under a

necessity, he may sell either; from an intermediate port, he may tranship part or the whole of a cargo, in hired, chartered, freighting, seeking, or general ships. With this extensive, but delicate and dangerous implied power, all masters, under the maritime law, are, at the present day, legally invested. They are so invested with it at the home port, when selected to take charge. By the owner's appointment, without specific instructions, masters become constructively clothed with these implied powers, to be exercised abroad for the employment or preservation of the ship. Such exercise of them may be essential and indispensable for the ultimate successful prosecution of a voyage and possible security of the interests of all concerned in any projected commercial enterprise.

This power of a master is derivative, therefore, from the act of the owner. The owner's appointment of a person to take command of his ship, implies that he reposes personal confidence in such person for his presumed nautical skill, and his supposed judgment, ability, and integrity; and thereby commends him as an agent, fit to be trusted by others as well as by himself,—in a foreign, as well as at the home port. Thus, the owner, by his voluntary act, gives the master commercial currency, to whatever port of destination or discharge, or intermediate harbor of refuge, distress, or call, the master may have occasion or be compelled to touch, stop, or stay, whether for instructions or repairs or other assistance.

Such, in law, being the effect of an appointment by the owner, it is plain that, after weighing anchor, getting outside of the headlands, and discharging his pilot, the master then becomes invested with an almost un-

restricted authority on ship-board. There, his word is law; from his judgment, in the ordinary navigation of a ship at sea, there is no appeal: and if he be a capable, prudent, intelligent, experienced, and skillful navigator, there would seldom, indeed, exist any occasion for questioning either the propriety of his orders or correctness of his course of conduct. While thus uncontrolled he may be at sea; yet ashore, on arriving in port, the master finds himself in a new element, where his supreme power as navigator, as well as that of factor, agent, or disciplinarian, comes at once under the scrutiny and restrictions of the general maritime law and local legislation, to both of which he must, for the time, strictly conform.

It is not designed, in this chapter, to consider the authority of a master for enforcing discipline over and among the crew. The consideration of that particular branch of the subject had better be reserved for a future chapter, wherein it is intended to treat of the relative duties of the mariner and his right to wages.

On the part of the owner, he has a right to expect from the master, honesty, skill, fidelity, and dispatch. Moreover, it would be the duty of a master to employ all his expressly delegated authority with discretion and good judgment; and, meanwhile, to refrain from resorting to the exercise of any of his implied powers, except upon occasions when the actual occurrence of an emergency shall imperatively call upon him to exercise those implied powers. But, ever ready to conform to that part of his duty which requires him to obey orders, a master should never be remiss in acting with his presumed prudence, judgment, and skill, under any and every combination of unforeseen, unexpected, and

unanticipated circumstances, not previously provided for by any provisional instructions.

Should a master, therefore, be intercepted or detained on the high seas by a hostile cruiser of superior force; or pursued and in danger of being overhauled and captured by pirates or other enemies; or suddenly come in collision with a sailing or steam vessel in mid-ocean; or be driven ashore *cum vi ventorum*; or strike upon hidden rocks or unknown reefs, not designated upon nautical charts; or, in any way, suffer injury or damage to the hull, sails, rigging, or apparel of his vessel, and in consequence thereof, touch at an intermediate port of refuge, for repairs or assistance; or, by wreck, partial or total, be so damnified in fact, or disheartened in prospect, that without speedy relief, further prosecution or ultimate completion of the voyage should appear to be impracticable or hopeless, — then, in any such contingency, the master must rely upon himself. No written instructions could avail him. He must necessarily fall back upon his presumed ability, energy, judgment, tact, and skill (the result of nautical experience), and call them into instant requisition: and these qualities, duly tested, must supply the want of preparation and absence of instructions. He is compelled to extemporize expedients; evoke his undeveloped professional talent; and summon to his aid and display those traits of character, which the owner, when putting him in charge, had a right to suppose he naturally possessed. The master must, in fine, do everything and omit nothing which, at the time, may be deemed to be useful or judicious for promoting the interest and subserving the enterprise of his owner.

On these various occasions, the good and great quali-

ties of an accomplished commander (whether called *Navarchus*, *Exercitor*, *Nauclerus*, *navis magister*, *le Maître*, or simply master), may be, and sometimes are conspicuously displayed: often successfully, though sometimes otherwise. If successful, the prestige a master may be likely to acquire, and the estimation in which he will be held, may equal the danger and difficulty he shall have encountered and escaped; and his remuneration should be proportionally adequate, and usually is so.

If, on the other hand, a master shall prove to be unfitted morally or incompetent physically for any surprising, trying, or perplexing exigency in which he may happen to be involved; then, loss or disaster to himself, owners, and perhaps crew, will be the probable barren result of all his futile expedients and consequent fruitless efforts. Surprise may unnerve, panic may dishearten, and personal incompetency may utterly disqualify him.

Whatever may be the real source or occasion of a master's misfortune, charity requires that a large share of forbearance should be exercised, else great injustice may be done to a merely unfortunate master. If such charity be not extended toward him, it is possible that a not unworthy master may become the victim of groundless surmises, unjust censure, and ill-founded criticism; so that the unaverted disaster or bad luck attending him, might be attributed to the wrong cause; as to imaginary or conjectural incapacity, or, indeed, to any other than the real and true occasion of the failure.

It is an impossibility, from the very nature of things, that all men should be equal to every occasion. Hardly any two persons are endowed with the same capacity, self-possession, moral courage, or physical pluck; nor

have they that desirable presence of mind which knows not danger ; nor that felicitous prudence, judgment and skill, which neither difficulty nor danger can baffle ; nor that command of temper and control of passion, which permit men to remain unruffled in the midst of the greatest perplexities.

And as men, by nature, differ in form and mould, so do their minds vary. Man's mental activity is variable. The brain is occasionally dormant, sluggish, and cannot easily be aroused to perform its required office ; and, at other times, it may be lively, quick, penetrating, readily performing its every function. But when, happily, it has once become thoroughly aroused, and the mind moves in those higher regions of invention, expedients, and performance ; then, does its intense activity so display, develop, and manifest itself, in systematizing and organizing affairs, as to appear capable of crowding and concentrating an age of action into a moment of time. Its rapid and ready judgment, wide glance, unfailing perceptions, and quick intuitions, at once seize upon and grasp the surest mode for ready relief, cut the Gordian knot of surrounding difficulties ; and, to extricate us from besetting obstacles, the mind rushes, as it were by logical processes, to wise and comprehensive views and sound conclusions, which lead directly to successful results.

Often, occasions make the man ; and then the man continues equal to his situation. So may it be with the master of a vessel ; the greater the necessity, the greater becomes his native vigor and inherent capacity. But, if a master has been unfortunate, charity should prompt all to suspend passionate judgment or hasty and precipitate condemnation, in regard to the man or his misfortune.

Few persons, indeed, are more tried or trusted than the faithful ship-master. And this trust follows him around the world. Abroad, he represents the ship-owner, as agent; at home, he is the owner's trusted servant; on the ocean, a sovereign; in the harbor, a citizen: his implied, unlike his express power, is discretionary and almost absolute.

In former chapters of this treatise, it has already appeared, that a master, with or without consultation, may order a jettison to lighten or relieve his ship; he may luff or wear ship to avoid collision; he may abide by or abandon a stranded ship or imperiled cargo; and, as may hereafter appear, he may, under an urgent and unavoidable pressure of necessity, sell, in a foreign port, either ship or cargo; and, in like manner, it will be attempted, in the present chapter, to be shown that, under a pressing, dominant, and uncontrollable condition of distress and necessity, a master, by an unsealed, simple contract, has the power to bind his owner and pledge his vessel as security for needed stores, provisions, supplies, repairs, or other necessities, furnished him in a foreign port, when destitute of funds, devoid of credit, and all other resort or resource is, or only seems to be actually impracticable, but that of a loan. A master may exercise the same implied authority at the home port, if the owner be there unrepresented, or is absent, or may not be within call or communicating distance.

By the concurrence of both English and American authorities, as well as by the general maritime law, this proposition is universally sanctioned, as I think: that a master may, in a foreign port, procure necessities proper for completing a voyage; and for necessities

so furnished, the furnisher (whether merchant, broker, carpenter, ship-chandler, shipwright, mechanic, material-man, or other person), upon the return of the ship to the home port, shall, by the maritime law, have a pledge, privilege, hypothec, or lien on the ship for the payment of such necessities so furnished; and ultimately the doctrine must inevitably be, *until* payment is made. This proposition is applicable to and embraces all foreign vessels. But the same principle may be, and by local legislation is, so extended as to apply to domestic vessels. For years, Maine, Massachusetts, New York, and other States have had such legislative enactments. Several decisions will be referred to, in which a consideration and discussion of those acts has taken place. Where a lien is given by any local legislation in behalf of builders and others, on domestic ships, the right and remedy are both special; and therefore should be asserted by the process and in the manner specially provided for by the local legislation. All required forms should be conformed to. To preserve a legal lien, the party should seasonably begin to assert it. He must be diligent and not remiss in seeking his remedy for such special right: otherwise he may, by *laches*, lose both right and remedy; for the waiver of a lien is as substantial a defense in these cases as would be an answer that the necessities were furnished upon the personal credit of a party.

At no period, hardly, has the legislation in England been salutary and stable, and the adjudications uniform. During the time of the English Commonwealth, however, something like consistency and system prevailed. But this was not of long duration. Immediately after the Restoration, the course of British legislation again be-

came retrogressive; or, at any rate, ceased to be progressive, in regard to the maritime liens of material-men. A distinctive feature in the republican parliament of Great Britain is, that in 1650, it greatly extended, by legislation, the then existing navigation laws; so as to prohibit all foreign ships from trading with its American plantations without first obtaining a license. In 1651, the same parliament passed the famous Navigation Act, prohibiting the importation into England or Ireland, or any of the Colonies, of goods or commodities which were of the growth, manufacture, or production of Asia, Africa, or America, unless imported in ships belonging to English subjects, and of which the master and greater number of the crew were English subjects. This became and continued the commercial policy of England until the present century.

But, in regard to the law of England, at that period, regulating the rights of material-men, for repairs made, or supplies furnished, the course of British legislation has materially differed in this respect. In those countries which are governed by the civil law, repairs and necessaries form a lien on the ship. The same doctrine prevailed in England, for a long time, in its maritime courts, when it was at length overthrown in the reign of Charles II., by the courts of common law, and the House of Lords. Nevertheless, the practice by the Court of Admiralty of paying material-men out of the proceeds of a sold ship, prevailed until it was pronounced illegal by the Judicial Committee of the Privy Council in the case of the *Neptune* (3 Knapp. 94); overruling the decision of the Court of Admiralty in the same case, reported 3 Hagg. 142. This modified rule has been acquiesced in, as will appear by many reported cases

since. In the *New Eagle* (10 Jur. 623), the Admiralty Court followed the doctrine as laid down in 3 Knapp, 94, *supra*. Such remained the practice in England, until by the 3 & 4 Vict. c. 60, sec. 6, jurisdiction was expressly conferred upon the High Court of Admiralty to decide all claims for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such vessel were within the body of a country, or on the high seas, at the time when the cause of action accrued.

In the exercise of this jurisdiction, the admiralty courts were bound to act equitably so as to protect the interests of all parties having a *bond fide* lien on the property. The *Alexander*, 1 Wm. Rob. 294.

By the more recent decisions of the admiralty courts, during the reign of the present sovereign, a just and enlightened liberality has been extended towards those persons who have been found willing to supply to a master, under circumstances of distress, the necessities requisite to enable him to prosecute or complete his voyage. Notwithstanding this want of uniformity in British legislatures and courts, parties, both in England and the United States, are now substantially placed upon the same footing. So that if necessities shall have been furnished, in a foreign port, to a master, in an emergency, acting within the scope of his implied authority, the person furnishing such supplies will thereby acquire a lien upon the ship as security therefor; unless one of two contingencies shall upon proof appear, either that the supplies were furnished upon personal credit, or other waiver of the legal lien. When either of these facts are made to appear in proof, it will constitute a valid defense in a suit for necessities.

When the pleadings are so framed, the precise condition of the ship and exigency of the master, should be searchingly investigated, in order to ascertain —

First. If the master acted within the scope of his implied authority, and under an invincible necessity.

Second. If there were no collusion between the master and the person furnishing the supplies ; and

Third. If no other possible resource were open for a prudent master, as the agent of the owners, to pursue.

When these general preliminaries shall have been fully settled, it will become material to know further, somewhat of the nature, description, character, and intended use of the supplies procured, before a *prima facie* case will be legally established, rendering the ship or owners liable. If it be so, then either of the suggested defenses of credit or waiver may be properly pleaded or relied upon. Under the general maritime law, either credit or waiver would be a substantial bar ; and many authorities may be cited to this effect. The giving a credit, in the case of either a foreign or domestic ship, is practically a waiver of the legal lien.

In Massachusetts, St. 1848, ch. 290 was enacted ; whereby it was provided, that when any debt was contracted for labor performed, or materials used in the construction or repair of any vessel within the Commonwealth, such debt should constitute a lien for its security and payment. On three several occasions, at least, did this act come under the consideration of the District Court for Massachusetts, and there received from Judge Sprague some judicial construction or interpretation. First in the *John Wells, Jr.* (1 Sprague, 178), when it was determined that necessary repairs made in this State upon a vessel belonging to another State, created

a lien by the law of Massachusetts, and by the general maritime law also. But in case a credit had been given for such repairs, the lien thus created could not be enforced until after the credit given had fully expired.

In the case of the *Antarctic* (1 Sprague, 206), the court in construing and applying the Massachusetts act of 1848, limited and restrained its application, and determined that a lien for materials furnished upon a new vessel extended only to those actually used in her construction.

In the *Sam Slick* (1 Sprague, 289), it was held that the State lien was not lost, although the vessel sailed from one port within this State to another port of the same State; but having been driven by stress of weather into a port in another State, left on the following day for the first port of destination, and duly arrived there. See also 13 Gray, 134; 20 How. 393.

Subsequent to these decisions, new and further legislation seemed to be demanded. Accordingly, in the General Statutes of 1860, chap. 151, §§ 12, *et seq.*, a new local lien-law was enacted. And though its provisions were extended and made much more specific, in order to supply defects pointed out by the judicial expositions already referred to, yet the new legislation was not designed "to affect the lien as now existing on foreign ships and vessels." Now, although the general maritime law remains unmodified, the local lien law of Massachusetts is very precise and comprehensive in terms. Its twelfth section reads as follows: "When, by virtue of a contract, express or implied, with the owners of a ship or vessel, or with the agents, contractors, or sub-contractors of such owners, or any of them, or with any person having been em-

ployed to construct, repair, or launch such ship or vessel, or to assist them, money is due to any person for labor performed, materials used, or labor and materials furnished, in the construction, launching, or repairs of, or for constructing the launching ways for, or for provisions, stores, or other articles furnished for, or on account of, such ship or vessel, in this State, such person shall have a lien upon the ship or vessel, her tackle, apparel, and furniture, to secure the payment of such debt; which lien shall be preferred to all others thereon except mariners' wages, and shall continue until the debt is satisfied."

SECT. 13. Requires a statement to be filed, with the city or town clerk, within four days from the time of leaving the port where the debt was contracted.

SECT. 14. No inaccuracy of description of the ship or vessel, when built in two places, shall invalidate the proceedings.

SECT. 15. Defines the mode of enforcing the lien.

SECT. 16. Sets forth contents of the petition to enforce the lien.

SECT. 17. Provides that amendments may be allowed by court;

SECT. 18. That claims of different persons may be consolidated;

SECT. 19. How claims shall be marshaled.

SECT. 20. Liens on foreign vessels are to remain the same as heretofore, and not to be affected by this act.

The mode of securing material-men in Massachusetts appears hereby to be singularly clear and comprehensive; the twelfth section, as recited, is a model of minuteness for enumeration of different claimants, and might well be adopted by New York, Maine, Pennsylvania,

Connecticut, Louisiana, and other States in the North and Northwest, which have attempted local legislation in behalf of liens of material-men on domestic vessels.

By such legislation, remedies are provided for almost every conceivable claim of merit. All persons, from shipwright to day-laborer, are included within its provisions; and, if they duly conform to its special mode of granting relief, cannot fail to secure it. The lumberman is secured as well as the shipwright by lien; and the obvious defects, formerly existing in this lien law of Massachusetts, are radically remedied.

In the case of a domestic vessel, therefore, the lien security seems to be complete in behalf of such as may hereafter furnish materials, supplies, repairs or other necessities.

In the case of the *Neptune* (3 Hagg. 142), the English Admiralty Court defined material-men to be those persons "whose trade it is to build, repair, or equip ships, or to furnish them with tackle, and necessary provisions."

If this imports limitation or exclusion, no such limitation or exclusion would seem to be applicable under the lien law for this State; but, as has been before stated, a more comprehensive remedy may be enforced against domestic, than even foreign vessels, under the general law:

The general doctrines in regard to necessities, as declared heretofore in England, and now upheld both in England and the United States, will be found fully stated in the authorities cited in this connection.

In England, *The Neptune*, 3 Hagg. 142; S. C. 3 Knapp, 94; *The Baddington's*, 2 Hagg. 425; Lush. 154, *The Onni*; *ibid.* 329, *The Comtesse De Frègeville*;

Swab. 158, *The Desdemona*; *ibid.* 165, *The Wataga*; *ibid.* 260, *The Nordstjernen*; *ibid.* 344, the *N. R. Gosfabrich*; *ibid.* 353, *The Perla*; *ibid.* 514, *The Afina Van Linge*; Brown. & Lush. 32, *The Ella A. Clark* (sometimes cited as *The Golden Age*); 1 *Adm. & Eccl. Rep.* 107, *The Aaltje Willemina*; 1 *W. Rob.* 357, *The Alexander*; Webster *v.* Seekamp, 4 *B. & A.* 354; *Belden v. Campbell*, 6 *Exc.* 886; 17 *L. T.* 257; *The Salacia*, 32 *L. J.* 43; *Carey v. White*, 1 *Bro. P. C.* 284; 3 *W. Rob.* 277, *The Helena Sophia*; *McIntosh v. Milcheson*, 4 *Exc.* 175; *The Bravo*, decided June 7, 1853; *Edwards v. Havill*, 22 *L. T.* 87; *Organ v. Brodie*, 10 *Exc.* 449; *The Constancia*, 10 *Jur.* 845; *Rich v. Coe*, *Cowp.* 639, by Lord Mansfield, but *vide* *Wester-Deal v. Dale*, 7 *T. R.* 312, by Lord Kenyon, who doubts Lord Mansfield's doctrine in *Rich v. Coe*; and the above are the leading and more recent English authorities to which, and the cases therein referred to, the student is commended.

Some of the leading American cases will here be referred to: *The Fortitude*, 3 *Sumner*, 228, in which Mr. Justice Story held that a master under necessity might procure such supplies and repairs as were fitting and proper to enable him to pursue and complete his voyage; *The Bridgewater*, *Olc.* 35; *The Brig Nestor*, 1 *Sum.* 75; *Bradley v. Bolles*, 1 *Abb.* 569; *Whitten v. Tisdale*, 43 *Me.* 451; *Scott v. Propeller Plymouth*, 6 *McLean*, 463; *Cox v. Murray*, 1 *Abb.* 340; *The Joseph Cunard*, *Olc.* 121; *Davis v. Child*, *Daveis*, 71; *Gurney v. Crockett*, *Olc.* 490; *Perkins v. Pike*, 42 *Me.* 141; *Boone v. The Hornet*, *Crabbe*, 426; *The General Smith*, 4 *Whea.* 438; *Davis v. Brig*, *Gilp.* 479; *Phillips v. Scattergood*, *ibid.* 1; *Harper v. New Brig*, *ibid.* 536; *Tree v.*

The Indiana, Crabbe, 479 ; The Bark Chusan, 2 Story, 255 ; Peyroux v. Howard, 7 Pet. 324 ; Larchet v. Sloop Davis, Crabbe, 185 ; The St. Jago de Cuba, 4 Wheat 409 ; Zane v. Brig President, 4 Wash. C. C. 453 ; The People's Ferry Co. Boston v. Beers, 20 How. 393 ; North v. Brig Eagle, Bee, 78, where it was determined that supplies to a foreign vessel, in a neutral port, were secured by lien ; The Young Mechanic, 2 Curtis, 404 ; Minturn v. Maynard, 17 How. 477, where the Court declined to admit a libel to be filed by agent against his principal, the owner ; The Bark Laura, 19 How. 22 ; The Sultana, 19 How. 359, where it was held that coal was not deemed necessities and so conferred no lien.

By the legislation and authorities referred to, it will be seen, that a ship-master under his implied or express authority, may procure such necessities as the proper employment of his vessel, and successful prosecution of the voyage may seem to require. Generally, it is discretionary with the master himself. No rule seems to have been laid down to control his action except this—that his acts in this respect should be the same as the probable acts and conduct of a prudent owner. But in the *Fortitude*, *supra*, the master, in the exercise of his authority to procure repairs and supplies for his ship in a foreign port, is not restricted to the procuring of such supplies and repairs only as are absolutely and indispensably necessary, but he may so exercise his power as to procure all such necessities as are reasonably fit and proper for the ship and voyage.

To the same point *vide* Webster v. Seekamp, 4 B. & A. 352.

From the authorities referred to, the following legal propositions may be derived : —

1st. Under the implied power of the master in a foreign port, the ship and ship-owner may be bound for the cost of necessities procured by the master's order, under circumstances requiring their procurement.

2d. It must also appear affirmatively that the master acted in good faith throughout, that the course he pursued was prompted by an invincible necessity, and that no other feasible resort remained optional for him.

In the *Brig Nestor* (1 Sum. 75), supplies of material-men to a foreign ship were deemed, *prima facie*, to be furnished on the credit of the ship and owner.

In the *Perla* (*supra*), a ship is presumed to be liable; and if a personal credit shall have been given, practically waiving the lien, this fact must be distinctly proved, and whenever workmen and material-men have a lien on a vessel, it may be enforced before the vessel is finished or sold. 1 Story, 244; Gilpin, 473; *ibid.* 536. In *Whitten v. Tisdale* (*supra*), supplies for which suit is brought against the owners, though furnished the master at a foreign port, must be proved to have been necessary. In *Abbott v. Balt. & Rap. Packet Co.* (1 Md. Ch. Dec. 552), the general liability of the owners for supplies furnished to the master was affirmed; and it was held, that should the owner seek to avoid such liability, he must show satisfactorily, that credit was given to others; either a personal credit to the master alone for such supplies, or that a special promise was taken from the master and relied upon, either or both of which might exempt the owner from his liability.

Certain species of repairs do not render the owners liable: thus, work done upon a vessel in a dry dock, in scraping her bottom preparatory to coppering, was not of a maritime character. So compensation therefor was

not deemed to be recoverable in a court of admiralty. *Bradley v. Bolles, supra*. So in 6 McLean, 463, *supra*, it was held that a painter, if he were in the habit of painting ships for a builder, and kept a general account against him, trusted such builder, and had not, therefore, a maritime lien for painting one particular vessel.

✓In marshaling preferred claims, the rule applicable to this subject is somewhat peculiar: claims of mortgagees are suspended, and of bottomry bond-holders even postponed, in order to let in the presumed better claims of material-men and others for necessities; that is, the later debt takes precedence of former debts. And it is both just and politic that when shipwrights are called upon to make repairs upon a vessel, and make such repairs, that their respective claims for labor and material furnished, should become privileged debts; giving to such shipwrights priority and preference over all others, even though the vessel may have been previously mortgaged, or otherwise pledged or hypothecated. †The reason for this rule seems to be, that, by their services, the ship had become materially enhanced in value; for without such timely repairs, indeed, the vessel, while lying idle at the wharf, or at anchor in the stream, may have so decayed as to become positively worthless. Such service and repairs, therefore, may, in fact, have saved her from premature destruction, and so revived and increased the security of the former pledgers, as to render their security in a measure reliable. Independently, then, of all considerations of mere policy, it is proper, reasonable, and just, that the shipwright, though later in time, should be first in right, and enjoy legal preference and priority over other creditors. This doctrine is distinctly held in 1 Peters' Ad-

miralty, 223, *Gardner et al. v. Ship New Jersey*; *ibid.* 233, *Stevens v. The Sandwich*.

At the time of the decision of the case of the *Neptune* (3 Hagg. 136), it was held that, by the civil law and law of nations, material-men were entitled to a lien, as well upon the proceeds as the ship itself; though it was held otherwise by the common law of England, which was then binding on the British Admiralty Court. Accordingly, that court denied to material-men any lien upon an English ship *in specie*, for costs of materials supplied in England. But this case was subsequently reëxamined upon appeal to the Privy Council, in the *Neptune* (3 Knapp, 94); and by the appellate court it was denied that material-men had any lien upon the proceeds of a sale of a ship, even when such ship had been sold by order of the Admiralty Court, although the proceeds of the sale were deposited in the registry of that court. But *aliter* in the *John*, 3 Ch. Rob. 288. In this last case as well as in the *Maitland* (2 Hagg. 254), the Admiralty Court exercised jurisdiction, though it admitted that a clear distinction existed in cases of foreign and domestic ships. But in a subsequent case, the *New Eagle* (10 Jur. 623), the Admiralty Court considered itself bound by the prior decision in 3 Knapp, 94, *supra*. Thus, then, at this period, by the law of England, material-men had no lien on the ship itself or on the proceeds of the ship, even when sold by order of a court of admiralty. Beside, the law of England, unlike the general maritime law of Europe, made it necessary to execute a bond of hypothecation in order to give a legal lien for supplies furnished, or necessities purchased. *The Vrow Mina*, 1 Dods. 235; *The Alexander*, *ibid.* 280; *The Zodiac*, 1 Hagg. 325; *The Vibilia*, 1 W. Rob. 6.

In this unsatisfactory and almost incongruous condition of the law in England, the British Parliament legislated farther in 1841.

By 3 & 4 Vic. ch. 60, sec. 6, jurisdiction was expressly conferred upon the High Court of Admiralty "to decide all claims for necessities supplied to any foreign or sea-going ship, and enforce payment" thereof, whether such ship or vessel may have been within the body of a country, or upon the high seas at the time when the necessities were furnished, in respect to which such claim is made.

By the act of 1861, 24 Vic. ch. 10, sec. 4, the High Court of Admiralty was authorized to take cognizance over any claim for building, equipping, or repairing any ship, if at the time of the institution of the cause, the ship, or the proceeds thereof, were under arrest of the court. The 3d section of the same act conferred jurisdiction to be exercised by proceedings *in rem*, or by proceedings *in personam*. "Ship" was defined by sec. 2 of the same act, to include every description of vessel not propelled by oars. Both the acts of 1841 and 1861 have received judicial consideration and interpretation, and in the *India* (9 Jur. (N. S.) 418), it was determined that under neither act had the court jurisdiction "to entertain a claim for repairs done in a foreign port." And in the *Ocean Queen* (1 W. Rob. 441), it was determined that a vessel, built and registered in New Brunswick, was not a foreign vessel within the purview of the act of 1841. Before that act, no foreign ship could be subjected to actions *in rem*, under any circumstances, for necessary supplies; great inconvenience and sometimes danger, therefore, happened to ships for want of anchors, cables, or provisions. To remedy these evils, the act of 1841

was passed; on the one hand, to remove the pressure of want, under an invincible necessity; on the other, to give to the British merchant or broker, making advances, a remedy and security for such advances. 2 W. Rob. 371, *The Ocean*; Swab. 166, *The Wataga*; Lush. 332, *The Comtesse de Frègeville*.

The reason for conferring such jurisdiction by the act of 1841, was to assimilate the English law to the general law of the maritime states of Europe, which gave a lien to persons who furnished necessities to a vessel in port, or on the high seas, as security for payment. 1 Spinks, 441, *The Flecha*. The act of 1841 simply revived the ancient law, in this respect, for necessities supplied to a foreign ship. It was not intended to alter the law, but merely to give a new remedy, which was rendered necessary in the peculiar case of a foreign vessel, and confined to that necessity. 1 W. Rob. 360, *The Alexander*.

By the act of 1861, the right under the act of 1841 was not affected. Nor was it affected by the fact that since necessities were furnished, the vessel had been sold to a British purchaser. *The Ella A. Clark*, *supra*, 8 L. T. (N. S.) 119.

With these references, this chapter on necessities is about to be concluded. A ship-master's power to procure them is primarily derived from his appointment. When the owner puts a master in charge, he thereby constructively clothes him with such implied power. If a proper contingency arrives, the legal exercise of this power must be attended with the existence and presence at least of two prerequisites, to wit, good faith and urgent necessity. The presence, indeed, of both, are indispensable, in order to justify a master in resort-

ing to this latent authority. And when both concur and the difficulties which beset a master are such as to constrain him to exercise this extraordinary power, in order to avert or avoid the pressure of an impending necessity, then, in such exercise thereof, the master is bound to observe the utmost good faith.

From this survey of the law as it has been, and as it now is, may be readily deduced certain plain principles, in reference to the navigation and employment of ships, such as —

1st. That a ship-master is constructively a ship-owner's agent; and, as such, in a time of exigency, is properly empowered to act at his discretion in behalf of the owner and all concerned.

2d. His situation and character afford conclusive presumption, that he has the requisite implied authority to initiate and adopt all measures, which may be deemed or seem necessary, to render the employment of the vessel efficient and beneficial to his employer and all other parties concerned.

3d. When, therefore, a ship abroad is so disabled by sea-damage or disaster as to stand in need of repairs, supplies, or other necessities, it is competent for a master, as it is within the scope of his implied authority, to procure such necessities; pledge both owner and ship for their payment; and, by making the contract therefor, create a lien in behalf of the furnisher for his security.

It has already appeared, in this treatise, how dependent all concerned necessarily are upon a prudent and skillful master, in properly observing the rules of navigation for avoiding collisions; in salvaging fragments from a wreck; in holding generally the mariner to his stipu-

lated duty ; in making, or forbearing to make a jettison ; in pledging ship or cargo for needed maritime loans ; creating and conferring maritime liens, when requisite for the voyage ; and, finally, in procuring all reasonably fit and proper supplies and repairs, demanded by a legal necessity, in the course of a voyage.

It now remains to consider the power of a master to sell either ship or cargo ; and, in the ensuing brief chapter, it may be seen wherein the elements, ingredients, and general prerequisites, which justify a resort to the exercise of this power to sell, shall appear to differ materially, legally, or substantially from the requisites and sources of the master's other implied powers ; and I apprehend that, upon examination, it will be found that the existence and exercise of this power to sell, is traceable to, and depends upon, 1st. Constructive agency ; 2d. Legal necessity ; and 3d. Fidelity, or *uberrima fides*.

CHAPTER IX.

MASTER'S POWER TO SELL.

THIS is a special implied power ; not a general authority, to be invoked at pleasure. It is derived from the character and relation of master to owner, and results from a master's official appointment to the charge of a ship. It is not commonly nor constantly to be exercised, but only occasionally evoked.

As a general rule, a master is not invested with this power. This is the view which pervades the earlier English authorities, and is entirely consistent with the doctrine as embodied in the French Ordinance, Art. 19, Liv. 2, Tit. 1, "*Du Capitaine*," where it is recorded that a master can only sell "*en vertu de procuration espéciale des propriétaires*," or by the owner's special authority.

Such was the general law of England formerly ; and in those older cases, reported in 2 Ld. Ray. 984¹ and 1 P. Wms. 392,² it was judicially held that though a master might hypothecate, yet he had no authority to sell ; and a sale, made by him, though it might be in due form, would fail to transfer any property ; and the Ordinance, in its general tenor, is conformable to this doctrine.

In *Tremenhere v. Tresillian* (1 Sid. 452), a sale by the master was held to convey no property to the purchaser. And although a case of necessity, legal, moral,

¹ *Johnson v. Shippen*.

² *S. P. Ekins v. East India Company*.

or physical, would seem susceptible of being established from the surrounding circumstances, yet it has been supposed that there might have been, in the opinion of Sir Matthew Hale, who presided at the trial, some unreported, qualifying facts, which tended to present an equivocal necessity, and were calculated to render the master's good faith suspicious, and a purchaser's collusion possible. Abb. Ship. 3.

Other English authorities, to the same effect, might be cited ; but it would seem to be superfluous. . At the present moment, this former conflicting, variable, and discrepant character in English legislators and judges, has gradually disappeared ; and England, upon this subject, seems to be now entirely in harmony with the United States. It may, therefore, be affirmed that, without the special authority from the owner, or the advice of a competent survey, or a judicial decree of some local maritime court, a ship-master has not any general power to sell his vessel in a foreign port ; and, as a general rule, this is inflexible. But all general rules may have exceptions ; and that prohibiting the power of sale to the master, comes within the category. The exception is a necessity. By different jurists, writers, and magistrates, this required necessity has been variously denominated urgent, extreme, pressing, supreme, absolute and utter, controlling, imperious, inevitable, invincible, uncontrollable, legal, physical, moral, inextricable ; and when such necessity shall exist, then the master, falling back upon his implied authority as constructive agent of the owner and all concerned, may exercise the power of sale in a foreign port.

It may be declared just as emphatically, though in fewer words, thus : that a master, in case of a domi-

nant, imperative, invincible necessity, incapable of being averted or avoided under the surrounding circumstances, has the power, in a foreign port, to sell his ship. A sale so made, is justifiable, and would be valid. All the incidents and consequences of a valid sale follow and flow from it. Privileges and preferences are obliterated or become transferred; liens are extinguished or do not attach; and the conveyance, in whatever form it may be made, whether with or without the customary muniments of shipping transfers, passes to the purchaser a clear, legal, and unincumbered title. Thereby and thereupon, the *res subjecta* or ship becomes freed from all express or tacit hypothecs or liens; and precisely when the purchase-money, or proceeds of the sale, passes from the purchaser to the hands of the master or other authorized receiptor, all adhering hypothecs and tacit liens slide silently from the *rem subjectam*, and fasten lawfully upon the proceeds, *in tempore ipso*; and there adhere and continue unextinguished, until ultimate payment or satisfaction shall have been made to the privileged creditors, or lien-holders.

The ordinary marks and tests which accompany a justifiable resort to, and exercise of this implied power of sale by the master, are to be found, as already stated, at the conclusion of the preceding chapter. Further examination and reflection only confirms the conclusion, then partially reached, that these tests were implied agency, legal necessity, and absolute good faith or *uberrima fides* in the master.

The first, agency, is the source whence this power of sale is primarily derived; the second, necessity, is the legal cause or material occasion for resorting to its exercise by the master; while the third, good faith, plainly

indicates the manner in which so extraordinary a power should invariably be exercised by the master, when he may be induced to resort to it, for adequate cause, and from worthy motives.

Agency is seldom controverted ; indeed it is hardly controvertible ; but must be generally conceded, so naturally does it flow from the known relation, subsisting between ship-master and ship-owner, as well as from the presumed character of a recognized master.

And so in regard to the good faith of a master: doubt is not to be expected or anticipated, though controversy has arisen, in a few cases, concerning the *bona fides* of a master. But, generally speaking, it is not to be apprehended that a trusted ship-master will turn his back upon all the past, ignore his personal antecedents, conduct, in a critical emergency, in a manner derogatory to his former estimation, and disregard that good faith which owners and others have a right to expect of him, by rashly making a nugatory and void sale.

But in every controverted case of sale by the master abroad, the first inquiry will invariably be, What was the necessity ? and this question will be propounded by all concerned, proximately or remotely, — by owners, shippers, underwriters, and privileged creditors as well as purchasers ; and all may desire, if they do not require, a satisfactory answer. Often the question turns upon a matter of insurance ; and then underwriters pursue the investigation into the surrounding circumstances of damage, difficulty, disability, distress, and necessity, so searchingly and thoroughly, that all may readily infer the extent and character of the necessity ; and whether the master has acted with or without prudence and discretion. Should it appear that there was

such a necessity as would justify resort to the extreme measure of selling, none would more readily acquiesce in it and gladly acquit a master of all blame, than insurers and their intelligent representatives.

If the necessity were adequate ; if it were sufficient, or (as I think the text should be), if the necessity were legal ; then sale by the master is justifiable, and his bill of sale passes a clear title, freed from all liens : and the gist of the whole inquiry should be as to the necessity, its extent and character.

In the *Bonita* (Lush. 252), it was, indeed, declared that the legality of a sale by a master mainly depended upon his conduct. Not to underrate the importance of good faith, prudence, and sound judgment in the master's every measure for practical relief, and avoidance of sale, it has ever seemed to be a cardinal point, first, to ascertain the degree, kind, nature, and extent of the supposed necessity ; whether it be real or pretended ; adequate to sustain a master in making sale ; sufficient to legalize a sale, if made ; in short, if there had existed such an absolute necessity as is required to precede a sale, in order to preclude the owner, and protect the purchaser. Such a necessity would be a legal necessity, if not physical or moral ; and it would compel or constrain a master to take the first step toward making a sale. Judicial decrees and surveys may be useful ; but they are not indispensable. They may serve to shelter and shield the master in a case of great doubt and difficulty ; but, after all, afford slight aid in dissecting, analyzing, and exhibiting all the elements and surroundings of a real, pressing, legal necessity. It is with this necessity that a master has to deal, when, relying upon his official position, he evokes his reserved, implied power,

under distress abroad, to sell his ship. When a vice-admiralty court commands, or the report of a competent survey commends, the sale of a disabled ship in a foreign port, both the decree of the former, and report of the latter are subrogated for the implied power to sell by the master,—substantially relieving him from his great responsibility,—and justify the sale. The action of the court and survey must necessarily be based upon the same state of facts constituting the necessity, as would have faced the master, were he constrained to act upon his own personal judgment alone. While, therefore, the decree and report might relieve the master, neither would remove nor obliterate the many tangible, visible, and material facts or besetting difficulties, which lie in reserve, and together beget the possibility and even necessity of sale by the master. And these ingredients combine to create the legal necessity of a sale; that is, they present such a predicament of distress or condition of disability, as will authorize and justify any master, so involved, in exercising the extreme and dangerous power to sell.

It is a surpassing necessity, exceptional, not common, and might well be termed a paramount necessity. When it arises in the course of a voyage, and practically suspends the ship's employment, by obstructing her continued and contemplated navigation, then arises that indefinable, ideal necessity, which may well enough be expressed by the term legal, or paramount (perhaps, on the whole, better by the latter expletive), but which neither courts nor jurists have hitherto but rarely attempted to define precisely; and then usually by circumlocution, or paraphrase, or approximation to definition by enumeration. And whether such paramount

necessity be a matter of definition or deduction (as in 4 C. & P. 276,¹ and 2 Pick. 264²), the class and kind of facts, upon which such deduction or definition is dependent, when collected, are generally similar.

Thus, a vessel, disabled by sea-peril, reaches her foreign port of destination, damaged, crippled, and needing repairs; or, it may be, puts into an intermediate port of refuge for relief and repairs. The necessity, justifying sale, depends upon the amount of repairs required, and extent of the damage inflicted. This investigation would involve an inquiry into: 1. The vessel's present condition: 2. Her possible future condition, if not sold: 3. The master's written provisional instructions, if any; and facilities for communication with the owners or their agents: 4. Supply of materials at the place of distress; and their cost, if procurable there: 5. If not, the feasibility of procuring them elsewhere: 6. Costs of transportation: 7. Presence or want of suitable laborers and shipwrights, and price of labor: 8. Master's available means or credit; or entire want of both credit and other resources: 9. Master's or owner's general ability to avoid sale: 10. Possibility of transshipping cargo, or sailing the vessel elsewhere: 11. Probability of refitting at all, unless at a ruinous rate of costs and expense: for, if the probable cost of repairing should exceed the ultimate value of the ship, when repaired, or, indeed, greatly exceed one half her value, deducting one third new for old; in either case, the refitting would be made at a ruinous expense, which no owner would incur; or other prudent, practical person, on the spot, would justify.

These are material facts, susceptible of being described

¹ *Somes v. Sugrue.*

² *Gordon v. Mass. F & M. Ins. Co.*

and proved, and, in the aggregate, might fitly define, or demonstrate the required necessity to justify a sale. In this aspect, a master may sell, without the advice of a competent survey, or the decree of a competent court. The surrounding facts *per se* may justify a sale by the master; he weighing these facts, judging of their significance, and taking the responsibility of settling for himself, that the impending necessity is an adequate or paramount necessity, sufficient to authorize and justify the sale of a ship to a foreign purchaser.

If the facts negative, or do not affirmatively show the existence of a necessity, their moral effect would be to restrain him from selling; if, on the other hand, the facts found affirm a predominant or paramount necessity, then the moral effect would be to constrain the master to sell; but we ought not to substitute effect for cause. The compulsion restraining from sale, results from want of facts; while the compulsion constraining a sale, implies or rather presupposes facts to exist which together constitute that necessity which, the law contemplates, shall potentially exist in order to empower a master to sell abroad. Such a necessity existing, be it legal, urgent, or paramount, would morally induce a sale, or impose a moral necessity upon a master to sell, just as effectually as would the advice of a competent survey. In *Gordon v. Mass. F. & M. Ins. Co.* (2 Pick. 264), where a competent survey advised a sale, the court said: "In such a case, a moral necessity is imposed upon the captain to sell." This is totally distinct from a representation of the surrounding facts. They produced the survey. The advice of the survey imposed a "moral necessity" to sell; in other words, morally persuaded the master to sell, and supplied him with adequate motive and author-

ity to justify a sale. Effect must not then be confounded with cause. Paramount necessity alone authorizes sale, without either the advice of a survey, or decree of a local court; the former is the master's warrant and authority; the latter are respectively substituted justifications, rendering the master's reliance upon his implied authority not at all necessary, but supererogatory.

Whether the necessity be regarded as a definition of a predicament or a deduction to be drawn from a state of facts, constituting that predicament, the *dictum* and inference are equally unsatisfactory, as reported in *Somes v. Sugrue*, 4 C. & P. 276. C. J. Tindal, discussing and defining necessity as an abstract idea, first makes a negative statement, and thence deduces a conclusion as follows: "There can, in such a case, be neither a legal necessity, nor a physical necessity; it must, therefore, mean a moral necessity." Without any impeachment of this as a metaphysical statement, it cannot, indeed, rank very high as a logical proposition. The *dictum* is from too high authority to be deemed careless.

The more the expression, paramount necessity, has been considered and reflected upon, the better does it seem to be suited to present the legal idea of such a necessity as should precede, in order to justify a sale by the master to a foreign purchaser of his vessel.

In the English and American common law court cases, already cited, the present prevailing doctrines of the Admiralty are but partially exhibited. The older doctrine, that a master had no power to sell in a foreign port without special authority from the owners, is adhered to in the cases cited from 1 Sid. 452; 1 P. Wms.

392; and 2 Ld. Raym. 984. In these authorities, the general negative rule is stated and sustained; but the exception to it is seemingly recognized and assented to in *Underwood v. Robertson*, 4 Camp. 138; *Hunter v. Parker*, 7 M. & W. 322; *Hayman et al. v. Molton et al.* 5 Esp. 68, by the common law courts; while in the *Fanny and Elmira*, Edw. 117 (1809); the Lord Cochrane, 2 W. Rob. 335 (1844); and the *Catherine* (formerly the *Croxdale*), 1 Eng. L. & Eq. 679 (1851), the possible exception to the rule is not only assented to in the Admiralty, but asserted; at first, indeed, by Sir William Scott hypothetically; and afterward, expressly, by Sir Stephen Lushington.

The case in *Edwards* is singularly suggestive; although Sir W. Scott's opinion consists principally of mere *dicta* as to what the law might be if he were then called upon to declare it. It was the case of a recaptured neutral; and upon decreeing restitution, the controversy was between a pretended purchaser, and the original, ostensible owners; and the latter were restored to possession by the court. The facts generally were, that the *Fanny and Elmira*, an American vessel, commanded by Captain Hicks, was sold by him at Sligo, Ireland, to P. Ormsby, a Kentuckian, with no express authority from the owner. It seemed the vessel got on the rocks in Sligo harbor; the master called a survey, which recommended, as for the interest of all concerned, a sale by the master; estimating that the costs of repairs would be £1,500, an amount greater than the probable value of the vessel. The vessel was accordingly advertised and sold for £305; the purchaser paying £107 3s. 9d, to the Messrs. Hume, as the correspondents of the owners at Sligo; and the residue was carried to

account between the master and the purchaser. One fourth part was afterward sold by the purchaser to the master, at the rate of the purchase, provided the master would navigate her. To this the master assented; and sailed for Riga. On his return, he was captured by the Danes; and afterwards recaptured and carried to England, by the British sloop *Hound*. There, the vessel came into the possession of the British Admiralty Prize Court; and two claimants intervened for possession of the property, upon decree of restitution, Orinsby, the purchaser, and Messrs. Coit & Edwards of New York, the registered owners. By whomsoever owned, the vessel was clearly neutral; and the only question for the court was, to whom she should be restored.

Sir W. Scott, in restoring the vessel to the owners, and refusing even amelioration expenses to the purchaser, gave one of his characteristic opinions; in which he incidentally touched upon, and anticipated the legal phase, feature, and view to be taken in the various discussions which have arisen subsequently, in cases affecting a master's power to sell; such as necessity, damage, repairs, resources, possibility of loans and advances, good faith, want of it, misconduct, fraud, collusion with purchaser, amelioration, and purchaser's right to indemnity; all of which were then, in 1809, foreshadowed in their legal bearings, with as much precision as if this magistrate were then actually declaring the law, instead of stating hypothetically what it might possibly be under a given state of facts.

The judge (p. 119) then said: "Although I do not know that such a power is given to the master by the general maritime law, yet, feeling its expediency, this

court would strain hard to support the title of the purchaser. But then there must be the clearest proof of the necessity ; it must be shown, not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose."

In the Lord Cochrane (2 W. Rob. 335), Dr. Lushington says: "It is not to be denied, that under certain circumstances the master of a vessel, in the exercise of the discretionary authority with which he is invested, may sell and dispose of the ship ; but this power I conceive to be strictly limited by law, and is only to be exercised under emergencies of great stringency ; emergencies which it is almost impossible to perceive beforehand, and which I shall not attempt to define in the present instance." This was the language used by the Admiralty Court in 1844.

In 1851, the same distinguished judge, in the *Catherine*, formerly the *Croxdale* (1 Eng. L. & E. 681 *et seq.*), said: "I take the law now to be, that where an urgent necessity exists, which the master cannot meet, it is competent for him to sell the vessel.

"If money could have been borrowed, there is an end of the necessity, and it is clear that the master had not authority to sell the vessel. This is not the law of England peculiarly, but is the maritime law of the whole world, and that for the protection of all ship-owners against all masters.

"A British vessel, coming into a foreign port, cannot be sold by the master, so as to confer a perfect title against his owners, and extinguish all mortgage claims, and all liens on bottomry or wages, even in a case of necessity.

"It is the duty of foreign purchasers to open their

eyes, and to take care what kind of bargains they make — that they guard themselves against liens which adhere to the ship."

This was the case of a British ship sold by the master in a foreign port, as unseaworthy, with the consent of the British Consul, and at public auction. She had been bottomried, but it did not appear that any notice of the bond had been given. The purchaser made repairs, gave the ship a new name, and dispatched her for England. As the ship remained *in specie*, the bondholder sought to enforce its payment in admiralty. The defence was condemnation and sale. But the court pronounced for the bond; and observed, "I am not satisfied in this case that there was any necessity for a sale; and am of opinion that this was originally a valid bottomry bond, and that it can be lawfully enforced against the ship;" and also gave costs.

These authorities from the English Admiralty Reports, containing the advance opinions of Scott and Lushington in the years 1809, 1844, and 1851, are indeed suggestive; and, together with the five more recent cases in Spinks', Swabey's, and Lushington's Reports, are not only significant, but conclusive of what is the present prevailing doctrine in England, as to the master's power of sale in a foreign port. 1 Spinks, 46, The Eliza Cornish; Swab. 146, The Glasgow; *ibid.* 386, The Margaret Mitchell; *ibid.* 484, The Australia; and Lush. 261, The Bonita (formerly The Charlotte).

It is then quite plain how gradually, since the decision reported in 1 Siderfin, the English judicial mind has assimilated itself to the American, by practically adopting the doctrines and principles as expounded and applied by the courts of the United States, in reference to a master's power of sale abroad.

For a long period, the general, ancient, negative rule remained unqualified, and seemed to be safely entrenched behind the highest authority there. Sir Matthew Hale was among the earlier judicial celebrities to promulgate it. First, it was held that a sale abroad by a master transferred no property;¹ then that a master could not sell, although he might hypothecate his ship;² thirdly, that he could only sell in case of an extreme necessity;³ and lastly, he might sell if it were best for all concerned, and if nothing better could be done; or as a forlorn hope.⁴ Thus, step by step, the exception of necessity hath steadily become more and more acceptable in the English tribunals; until it is, at length, permanently engrafted upon the old rule, as part and parcel thereof, making it in modern times substantially the rule itself. As matter of fact, it is oftener invoked into legal proceedings, and covers more controversy, and concludes more cases than the original rule itself.

This exception, therefore, having become recognized universally in both countries, the English and American doctrine is now, theoretically, the same. In what respects their courts may differ in practically applying and giving force and effect to this doctrine, might be interesting as a speculative inquiry. But the courts of the United States will incline to follow the legitimate and logical consequences of the doctrine as contained in the modern modified rule.

That rule may then be thus stated. By the general maritime law, a master has not any express power to sell his ship abroad; and, unless it be *ex necessitate rei*, he

¹ 1 Sid. 452, *Tremenhere v. Tresillian*.

² 2 Ld. Raym. 276, *Johnson v. Shippen*.

³ 4 Camp. 138, *Underwood v. Robertson*.

⁴ 7 M. & S. 322, *Hunter v. Parker*.

has no implied power. But when, by reason of sea-peril or damage, he may be compelled to put into a port of distress for repairs, and there, destitute of resources, credit, or other means to procure such repairs, finds that he is prospectively prevented, by the compulsion of an impending necessity, from further prosecuting his voyage, then a master may, upon his own judgment and discretion, resort to the exercise of that necessary power implied by the law, and sell his ship for the benefit of all concerned, as their agent. Throughout, the master must act *optimâ fide*; and if a sale be made by him under such circumstances, such sale, so made, will be valid in law to pass property to the purchaser, and will extinguish all existing liens, or rather transfer them from the ship sold to the proceeds of such sale.

The American cases, *The Tilton*, 5 Mason, 475; 2 Sum. 206, *The Sarah Ann*; 5 Pet. 620, *The Patapsco Insurance Company v. Southgate*; 13 *ibid.* 400, *New England Insurance Company v. The Sarah Ann*; 19 How. 157, *Post et al. v. Jones et al.*, fully justify the master in making sale, in a foreign port, of his vessel, in an emergency.

But this whole subject and the authorities have been recently passed upon, in the First United States Circuit, by Mr. Justice Clifford, in an unreported case, in which all the English and American cases were incidentally noticed or referred to; whether applying to the implied power, necessity, sale, its effect, proceeds, liens, or amelioration expenses. And so thorough is the court's exposition, and so just its conclusions in the case, that, upon appeal, I learn the decision has been affirmed by the United States Supreme Court.¹ It has been my privilege to examine the exhaustive argument of the claim-

¹ *Vide The Amelie*, 6 Wal. 18, and note at end of this chapter.

ant's counsel, and inspect a copy of Judge Clifford's very able opinion; and from such examination and inspection, it would seem to be a not unfitting conclusion of this chapter, to here insert a brief statement of the facts and the point decided in the libel of "Charles Fitz, appellant, v. The Galiot Amelie."

On the 16th March, 1862, the Plata (afterwards the Amelie) sailed from Surinam to Boston with a cargo of 242 hogsheads of molasses, 50 do. and 9 barrels of sugar, and 16 pieces of old copper. She encountered rough and tempestuous weather, and on the 11th April, was thrown on her beam ends, broken badly on her larboard side, the water rushing in beyond the pumps' capacity for relief; when, by good seamanship, she was put away upon another tack for a port of refuge, and safely reached, finally, Port au Prince. There, after three surveys, she was sold by the master, and the claimant, B. Riviere, became the purchaser; and insisted at the hearing, that such sale was justified by necessity. The court, in regard to necessity, say: "Perhaps it is not possible to devise any rule which will apply to all cases; but it is believed that some approximation may be made in that direction.

"When the ship is disabled by perils of the sea, and the master has no means of getting the repairs done in the place where the injury occurred; or if, being in a place where the repairs might be made, he has no funds in his possession, and cannot, on account of the distance, or other sufficient cause, communicate with the owner; and is not able to raise the necessary means by bottomry or otherwise, to execute the repairs; or, if the injuries to the ship are so great that the cost of repairing her would be greater than her value after the repairs

were made; or if the ship is disabled so that she cannot proceed, and the cost of repairs will amount to more than half her value, reckoning one third new for old, and the master has no funds, and can neither procure any, nor communicate with the owner, and the whole circumstances are such that a prudent owner would decide to break up the voyage; then the master is justified in selling the ship, as the best thing that can be done for the interest of all concerned. Such a state of circumstances creates the moral necessity, the urgent necessity, the extreme necessity, the imperious, uncontrollable necessity, described in the decided cases, and authorizes the master to sell the ship, if in his judgment, honestly exercised, the sale will best promote the interest of all concerned. When those conditions, or any class of them concur, it becomes the duty of the master to decide the question; and if he finds that the disaster will be most alleviated, and the interests of all will be best served by a sale, then it is his duty to act in the premises; and if he makes the sale *bonâ fide* as the agent of all concerned, it is valid, and all are bound by his acts."

Another, and the principal point decided, is specially important, because novel; which is, that a justifiable sale gives the purchaser a title, free from secret or other liens. These liens are, by sale, silently detached from the *rem* and legally attach to the proceeds. And Judge Clifford says: "The lien, when the ship was lawfully sold, was transferred to the proceeds, which became, by operation of law, the substitute for the ship, in the sense of the admiralty law. Unless such be the law," he adds, "then the authority conferred to sell in a case of necessity is a mockery, as no prudent man would ever purchase such a title."

The concluding language of the court, in this last case, seems to be strong in expression ; but not stronger, perhaps, than so just a legal conclusion may warrant. All deep convictions produce intense expressions ; and absurdities in logic cannot fail to engender honest surprise, if not indignation.

To confer, then, upon a master, the power to sell, and yet withhold from him the right, after sale, to give to the purchaser a clear title, is an absurdity ; and, as such, not undeserving of expressed judicial indignation. And such expression, on proper occasions, does not appear to be out of place ; but, on the contrary, in the present instance, is both timely, salutary, just, and refreshing.

Thus, to bestow on a master the exceptional power of sale abroad, and render it his duty, in a necessity, to exercise that power ; and, after conforming to all the preliminary requirements, such as consulting the owner's local agents, consignees or correspondents ; advising with the resident consular or commercial agents, Lloyd's agent or other insurance representatives ; procuring a competent survey and thence obtaining a report, verbal or in writing, recommending summary sale ; laboriously but vainly striving, meanwhile, to raise the requisite funds on his own or owner's credit, or by bottomry of ship or hypothecation of cargo ; and finally, upon a moral compulsion, acting upon his own judgment, fairly exercised, and after due notice, making sale at public auction as best for all concerned, and transferring his ship to a purchaser by bill of sale, proper in form ; to be then notified judicially or advised professionally, that a master's sale, though justified, is null and nugatory, and cannot pass a clear title, — what would this

be but mocking a meritorious master and entrapping a fair purchaser?

On such an occasion, the extreme language of an eminent English judge might be opportunely and well repeated, — “it is but a snare and mockery.”

And good faith requires a master, on such occasions, invariably to conform to all the precautions just enumerated, as far as practicable.

In the succeeding chapter, the official position of a master will be viewed in another aspect. Hitherto, his relations to the owners, the vessel and cargo have been especially considered. But it now remains to discuss hereafter his duties in relation to the ship's company or crew and freight.

Accordingly, the next chapter will be devoted to a consideration of the master's rights and duties, as a disciplinarian, in reference to the mariner's; and the correlative rights and duties of the mariner, in relation respectively to the owner, the master, and to the vessel.¹

¹ The opinion in the *Amelié* (6 Wallace, 18), was given December, 1867, by Mr. Justice Davis. But the author had not seen it until October 29, 1868, after this chapter was in print; when he was gratified to find that the language of the court expressly confirmed the justice and propriety of his critical examination of the character and definition of the necessity which justified the master's resort to his implied power of sale.

Mr. Justice Davis (p. 27, *ibid.*) says: “The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a *legal necessity* to do it.” And the same view was taken, in the argument to the court at Washington, in behalf of the libellants, by their counsel, who may be said to be unsurpassed if not unequalled for ability and experience in this branch of law.

In all other respects the decision of the Judge of the First Circuit is fully affirmed; and the case cannot fail to become leading and conclusive.

CHAPTER X.

MARINER'S WAGES.

MARINER'S WAGES will be treated under three distinct heads : —

1. The mariner's contract.
2. The earning and payment of sailor's wages.
3. The forfeiture of their wages.

Seamen, as a class, are proverbially reckless, rash, and improvident ; and as such, are deemed to be the peculiar favorites of admiralty ; and are often designated as the "wards of admiralty courts."

Inured, on shipboard, to much hardship, danger, and exposure, the mariner, in character, partakes largely of the boisterous element on which he sails, and his adopted mode of life. Too often necessitous, and in nautical phrase, "hard up," he is not seldom exposed, when ashore, to unfair practices, fraud, and imposition. Free, liberal, and generous with his limited amount of wages (commonly received at a single payment), credulous and unsuspicious, he is beset, on his first arrival, by sharp and sometimes unscrupulous harpies, who easily strip him.

On first landing, the sailor thinks but little, as an "old salt," of the stormy days and sleepless nights passed by him in earning his wages ; at once forgets his long day's works and dark night vigils ; and not unfrequently seeks and recklessly plunges into the lowest and least moral amusements. Failing to remember his

great toil for so little pay, he is consequently unrestrained; and spends idly or squanders profusely all his wages when received, and perhaps shortly after being received, in many cases.

Still his legal rights are well defined and properly protected in admiralty. Those rights, their nature, extent, and value, are well understood by maritime courts, as are also the personal privileges of the seaman; and all are securely guarded by the principles of maritime jurisprudence which govern the proceedings of courts of admiralty.

1. The contract of the mariner with the merchant prescribes the duties of the mariner, in all his varied relations: to the ship, to the owner, to the master; and in these three aspects, those duties are lucidly laid down in the maritime codes of Continental Europe, and pretty distinctly recognized, and generally sanctioned, both by English and American admiralty decisions and practice.

To the ship, the seaman must be faithful in navigating and preserving her.

To the owner, he must be honest, capable, and skillful on ship-board.

To the master, he must be obedient and prompt in the performance of his duties.

And these qualifications, when all are found to coexist, entitle the mariner unqualifiedly to his wages; unless, peradventure, by wreck or capture, both freight and wages are totally lost.

General misconduct or incompetency then alone work a forfeiture of wages.

If unable or indisposed to perform the special duty for which he shipped, the seaman is liable to a forfeiture of wages.

If guilty of embezzling the ship's stores or cargo, the seaman then may forfeit his wages, to the extent of the owner's or shipper's loss.

And if negligent, inattentive, or disobedient to the master, or habitually drunk, then may the mariner be discharged, disgraced, or degraded, even with forfeiture of wages.

The laws of Wisbuy, those of the Hanse Towns, Oleron, and the French Ordinance of Louis XIV., embody the principles of maritime law which generally regulate the contract of the mariner and his claim under it to wages; unless it be where those ancient marine ordinances have been subsequently and expressly modified, qualified, extended, or abrogated even, by the local, municipal, or statute law of England or the United States.

In England, there is the High Court of Admiralty to take cognizance of these claims; in her colonies and dependencies, the vice-admiralty courts do the like; but both, however, are subject to be reviewed: formerly it was by the delegates, or commissioners of the Privy Council; but now, hearing upon appeal is by the judicial committee of the Privy Council.

In the United States, there are the District courts which take cognizance in admiralty of maritime matters; and whose decisions are subject to revision by the United States Circuit and Supreme courts, and may there be affirmed or reversed.

In the commercial codes, the portions more immediately applicable to the duties expected for wages, of the mariner, in wreck or peril, are article 15th of the laws of Wisbuy; 44th of the Hanse Towns; 3d of the

laws of Oleron ; and Book 3, tit. 4, art. 9, of the Ordinance of Louis XIV.

The first portion of the article from the laws of Wisbuy reads thus : —

“The mariners are obliged, to the utmost of their power, to save and preserve the merchandise, and for doing it, ought to be paid their wages ; but not otherwise.”

Art. 44 of the Hanseatic code reads thus : —

“If a ship is lost, the mariners are obliged to save as much of the goods as they can ; and the master ought to reward and satisfy them for it, and pay the charge of their journey home : if the mariners refuse to assist the master, they shall have neither wages nor reward.”

In like manner it is provided by art. 3d of the laws of Oleron, that the mariner, exerting himself to save from the ship, when wrecked, shall be reasonably rewarded.

And so Book 3, tit. 4, art. 9, of the Marine Ordinance of Louis XIV. provides that —

“If some part of the ship be preserved, the seamen shall be paid the wages that are due to them, out of the wreck they have preserved ; and if there be only goods saved, the seamen, even those that are engaged by the freight, shall be paid their wages by the master, proportionably to the freight he receives ; and whatever way they be hired, they shall be over and above paid, for the time they are employed, in saving the wreck and goods.”

So the Ordinance of Philip II. of Spain (1563) provided, “that seamen are bound to save from wreck what they can ; and therefor are to be rewarded ; if

they do not exert themselves, they forfeit both wages and reward."

In these extracts are contained the doctrines of the foreign ordinances, regulating, in cases of wreck, the title of seamen to wages, before those codes were fully incorporated or judicially adopted into the proceedings, and thus became part and parcel of the established practice of admiralty courts in England.

In the United States, the 14th of the rules adopted in 1845, regulates the mode of procedure in admiralty, and is as follows:—

"XIV. In all suits for mariner's wages, the libellant may proceed against the ship, freight, and master; or against the ship and freight, or against the owner, or master alone *in personam*."

A large class of cases are reported in the United States, explaining and settling the doctrines relating to the mariner's contract. And as these cases preoccupy all the ground, and fully discuss all the commercial codes of Continental Europe, as well as the maritime and admiralty cases and decisions in England, I shall content myself with a reference to and brief abstract of the American cases, with an occasional reference to some leading English cases and the doctrines there expounded.

In the United States, the Acts of Congress of 1790 and 1840, are as full and minute as the English Acts of Parliament, which now are or have been in force in Great Britain. In each country, the mariner's contract is required to be in writing; the voyage to be definitely specified, the rate of wages agreed upon, before the mariner is induced or permitted even to sign the shipping articles. Under this contract, the mariner agrees

to perform certain service, and the performance of that service generates his legal title to wages.

In the United States, an omission to reduce the contract to writing, or get the mariner's signature to the shipping articles before sailing, is made penal by act of Congress; the master subjected to a penalty of \$20; and the owners made liable to pay the highest rate of wages, known to have been paid within three months prior to the voyage.

Written contracts may therefore be deemed indispensable. They are easily procured at the stationers' in all sea-ports; and well trained merchants usually keep themselves well supplied with the proper forms for such purposes. So the penalties for non-compliance with the requirements of the statute, in regard to shipping articles, or written contracts with seamen, are seldom incurred; and there never should exist any occasion for enforcing those statute penalties. If the master or merchant be, in this respect, blamable either from accident or negligence, prompt reparation ought, voluntarily, to be made to the seaman, without compelling him to resort to proceedings in an admiralty court, or otherwise invoking the aid of a district attorney or other government official.

Keeping steadily, then, in view, the explicit directions of the statutes of 1790 and 1840 in regard to the inception and fulfillment of the contract as therein required to be made and executed, it is obvious that a proper attention to the terms of those enactments, and a fair and just interpretation of their various provisions, would really have rendered some of the judicial determinations in this respect quite unnecessary. A medicine chest is required by the act of Congress,

July 20th, 1790, for every vessel of one hundred and fifty tons; and, in default of having such chest so provided, and newly supplied with fresh medicines at least once in every year, the master shall be liable to provide and pay for all such advice, medicine, or attendance of physicians as any of the crew shall stand in need of, in case of sickness, at every place where the ship may touch, during the voyage, without any deduction from the wages of such sick seaman.

And this plain provision of law has given occasion for elaborate discussion, in the case of *Harden v. Gordon* (2 Mason, 557), which has been deemed a leading case, and is frequently cited for its enlarged and liberal views and ample learning.

As to the contract entered into by all mariners before going on a voyage, its nature, force, and effect have been often the subject of judicial consideration and construction. The mariner ships to perform a specified service. He thereby engages that he is competent to perform the understood duties of the grade for which he contracts. And if he be so, is willing, and actually performs those duties, he is justly entitled to the compensation for which he stipulated. Performance of his promised service is his legal foundation and title to wages.* Numerous *dicta* and some dogmas may be found in the books. These have heretofore prevailed in the courts, making seamen's claims to wages to depend on the contingency of earning freight. But in England this notion is exploded, both by its courts and legislature; while, in this country, if Congress do not expressly interfere, a similar fatality is possible, perhaps sure.

Many authorities in both countries are worthy of

attention. Some of which, on the subject of the mariner's contract, I will now cite. Bee, 48, *The Atlanta*; *ibid.* 423, *McCulloch v. Lethe*; *ibid.* 424, *Shaw v. Same*; 1 Pet. Adm. 233, *The New Jersey*; 2 *ibid.* 268, *Black v. The Louisiana*; Abbott Sh. 714; Ware, 437, *The Crusader*; 5 Ch. Rob. 14, *The Frederick*; 1 Pet. Adm. 212, *The Regulus*; Ware, 83, *Turner's case*; Daveis, 121, *The Dawn*; 1 Hagg. 182, *The Eliza*; *ibid.* 188, *The Jane and Matilda*; *ibid.* 249, *The Countess Harcourt*; *ibid.* 347, *The Minerva*; *ibid.* 370, *The George Home*; *ibid.* 378, *The Porcupine*; 2 *ibid.* 243, *The Cambridge*; 3 *ibid.* 376, *The Prince George*; 2 *ibid.* 79, *The Harvey*; 1 Mason, 443, *United States v. Hamilton*; 2 *ibid.* 541, *Harden v. Gordon*; 3 *ibid.* 161, *Willard v. Dorr*; 2 Dods. 104, *The Lord Hobart*; 1 Sum. 380, *Cloutman v. Tunison*; *ibid.* 384, *Macomber v. Thompson*; 3 *ibid.* 443, *Brown v. Lull*; 1 Story, 1-7, *Taber v. United States*; Gilp. 83, *The Nimrod*; *ibid.* 147, *Douglas v. Eyre*; *ibid.* 219, *The Ship Moss*; *ibid.* 329, *Vea- cock v. McCall*; *ibid.* 452, *Wickham v. Blight*; *ibid.* 514, *Wilson v. Ohio*; *ibid.* 516, *The Superior*; *ibid.* 524-34, *Thackeray et al. v. The Farmer*; 4 Esp. 182, *Wilkinson v. Fraser*; 6 Mass. 300, *Mayo v. Harding*; 2 Ch. Rob. 241, *The Isabella*; 14 Johns. 260, *Bartlett v. Wyman*; 3 Pick. 435, *Baxter v. Rodman*; 19 *ibid.* 496, *Baker v. Corey*; 1 Abb. Rep. 344, *Ringold v. Crocker*; *ibid.* 451, *The Atlantic*; *ibid.* 270, *The Mary Ann*; Olc. 232, *The Schooner Eagle*; *ibid.* 396, *The Steamboat Hudson*; Swab. 415, *The Glentanner*; *ibid.* 346, *The William*; *ibid.* 362, *The Milford*; Lush. 44, *The Albert Crosby*; *ibid.* 128, *The Union*; *ibid.* 285, *The Hamett*; *ibid.* 566, *The Atlantic*; Brown & Lush. 355, *The Nonpareil*; 1 Eng. Adm. & Eccl. Rep. 309, *The Philippine*.

Touching the earning and payment of mariner's wages, the English and American authorities are: 1 Pet. Adm. 117, *Hart v. Littlejohn*; *ibid.* 128, *The Brig Elizabeth*; *ibid.* 128, *The Hope*; *ibid.* 247, *Atkyns v. Burrows*; *ibid.* 250, *Mitchell v. Orozimbo*; *ibid.* 255 *n.* *The Happy Return*; *ibid.* 219, *The Washington*; *ibid.* 132, *Watson v. The Rose*; *ibid.* 123, *Howland v. The Lavonia*; *ibid.* 142, *Walton v. The Neptune*; *ibid.* 155, *Scott v. The Greenwich*; *ibid.* 157, *Jackson v. Sims*; *ibid.* 215, *Lady Walterstoff*; 2 *ibid.* 384 (446), *Singstrom v. The Hazard*; *ibid.* 411, *The Cyrus*; *Edw.* 239, *The Courteny*; 3 *Esp.* 71, *Sigard v. Roberts*; *Bee*, 173, *S. Carolina*; *ibid.* 134, *The Fair American*; *Ware*, 91, *Thatcher v. Steele*; *ibid.* 109, *Sherwood v. McIntosh*; *ibid.* 454, *The Mary*; 1 *Mason*, 45, *Emerson v. Howland*; *Ware*, 65, *Hutchinson v. Coombs*; *ibid.* 9, *The Nimrod*; *ibid.* 485, *The Dawn*; 1 *Gall.* 181, *The Saratoga*; 2 *ibid.* 56, *ex parte Giddings*; *Bee*, 414, *The Tristram Shandy*; *ibid.* 441, *The Ship Hazard*; 2 *Pet. Adm.* 403, *The Gloucester*; 2 *Mason*, 319, *The Two Catherines*; 4 *ibid.* 541, *Townsend v. Orne*; 2 *Mass.* 39, *Brooks v. Dorr*; 9 *ibid.* 404, *Lemon v. Walker*; 10 *ibid.* 79, *Wilson v. Bragdon*; 11 *ibid.* 545, *Hooper v. Perley*; 12 *ibid.* 73, *Arfredson v. Ladd*; 14 *ibid.* 66, *Spofford v. Dodge*; 3 *Kent Com.* 189, *et seq.*; *Bee*, 255, *Carey v. The Kitty*; 12 *Mass.* 576, *Luscomb v. Prince*; 3 *Esp. N. P.* 36, *Bergstrom v. Mills*; 4 *East*, 43, *Pratt v. Cuff*; *ibid.* 546, *Thompson v. Beale*; *ibid.* 566, *Johnson v. Broderick*; 1 *Hagg.* 59, *The Castilla*; *ibid.* 186, *The Eliza*; 2 *ibid.* 158, *The Malta*; 3 *ibid.* 196, *The Lady Durham*; 1 *Peters*, 207, *Giles v. The Cynthia*; 2 *ibid.* 261, *Wolf v. The Oder*; 5 *ibid.* 675, *Shepard v. Taylor*; 1 *Pet. C. C.* 142, *Girard v. Ware*; 9 *Johns.* 138, *Ward v. Ames*; 12 *ibid.* 143,

Ogden *v.* Orr; *ibid.* 324, Wetmore *v.* Henshaw; 3 *ibid.* 518, Hoyt *v.* Wildfire; 3 Greenl. 1, Blanchard *v.* Bucknam; Abb. Sh. 473 and authorities cited; 1 Pet. C. C. 182, Thompson *v.* Faussatt; 1 Bro. P. C. 137, Buck *v.* Rawlinson; 9 Cowen, 158, Van Beuren *v.* Wilson; 2 Dods. 403, The Elizabeth; *ibid.* 501, The Juliana; 2 Ch. Rob., Robinett *v.* The Ship Exeter; 3 *ibid.* 92, The Beaver; 1 Sprague, 97, The Massasoit; *ibid.* 199, The Bark Rajah; 1 W. Rob. 88, The City of London; 2 Peters, 264, Hindman *v.* Shaw; Abb. Sh. 733; Newb. 5, Emily Segeman *v.* Schr. Brandywine; Olc. 232, The Schr. Eagle; *ibid.* 71, Coalboat The D. C. Salisbury; 2 Dall. 170, Marshall *v.* Montgomery; *ibid.* 420, The Polly; *ibid.* 428, The St. Oloff; Gilp. 193, The Juniata; 3 Hagg. 100, The Hoghton; Swab. 81, The Araminta; *ibid.* 152, The Josephine; *ibid.* 256, The Mobile; *ibid.* 310, The Ringdove; Lush. 509, The Annie Childs; *ibid.* 509, The Salacia; *ibid.* 190, The Princess Helena; Brown & Lush. 104-212, The Chieftain; 1 Eng. Adm. & Eccl. 8, The Mary Ann; *ibid.* 49, The Fleur de Lis.

As to the forfeiture of wages by the mariner, the following cases may be cited: Edwards, 91, The Baltic Merchant; 1 Pet. Adm. 128, The Elizabeth; *ibid.* 160, The Commerce; *ibid.* 201, The Phenix; *ibid.* 210, The Philadelphia; 2 *ibid.* 407, The Cyrus; Ware, 307, The Rovenia; *ibid.* 367, The William Harris; Flanders, M. L. 414, and citations; Gilp. 140, The Independence; *ibid.* 207, Knagg *v.* Goldsmith; 1 Mason, 114, Spurr *v.* Pearson; 4 *ibid.* 95, The Mentor; 1 Sum. 373, Cloutman *v.* Tunison; 1 Hall, 238, Austin *v.* Dewey; 12 Serg. & Rawle, 266, Buck *v.* Lane; 1 Pet. Adm. 139, The Mary; *ibid.* 165, The Susan; 4 Mass. 664, Cotel *v.* Hilliard; 3 Esp. R. 269, Lunland *v.* Stevens; 3 Story, 108,

Coffin *v.* Jenkins ; 3 Hagg. 307–315, *The Test* ; 1 W. Rob. 73, *The Blake* ; 1 Sprague, 88, *The Cynosure* ; 1 Abb. Rep. 564, *Miller v. Kelly* ; Olc. 4, *The Steamboat Swallow* ; 2 Sprague, 56, *Hathaway v. Jones* ; Swab. 312, *The Camilla*.

In the cited cases, if carefully examined in the original reports, in reference to the mariner's contract, its construction, and the penal consequences attaching to the mariner, there are three things quite observable.

First. Mariners, as the wards and favorites of admiralty, are not to be permitted to be overreached in making their contract to proceed on a voyage.

Second. They shall not be defrauded of their wages if justly and fairly earned by performance of their stipulated service ; and

Third. Should they prove to be indisposed or incompetent to completely perform that service, mariners thereupon become liable to forfeit all or any portion of their stipulated compensation.

The protective principles of maritime law assure the sailor that he shall be fairly dealt with, in courts exercising admiralty and maritime jurisdiction. As to the contract, it shall consist of only the ordinary stipulations of the shipping articles of seamen. No novel, unusual, or unfair clauses shall be imported into these articles, unless they be generally consistent with the seaman's maritime immunities and recognized privileges, are fully explained to him in advance, and cannot, upon any contingency, derogate from his conceded rights under the general maritime law. Any interpolation of extraordinary clauses into the shipping articles would necessarily subject the whole to suspicion and scrutiny. If, therefore, upon any occasion, it should

appear that such clauses had been introduced, either inadvertently or designedly, the legal effect of such introduction would operate more to the prejudice of the owner and master than of the mariner.

Accordingly, all special agreements made with the mariner should be fully disclosed to him at the time of making them, either by the merchant himself, shipping-master, or other agent employed.

If this be not done, all unusual clauses will be deemed fraudulent interpolations; and, as such, adjudged nugatory and void upon general principles, as well as contrary to public policy; and merchants or others, who indiscreetly attempt such things, should not be surprised to find themselves visited with the penal consequences which ordinarily attach to such a course of conduct, either under the law of the land or by the general maritime law of the commercial world. See the early case of *Buck v. Rawlinson*, *supra*; *The Juliana*, decided in 1822; *The Eliza*, 1823; *The Minerva*, 1825; *The Prince Frederick*, 1832; *Harden v. Gordon*, 2 Mason, 557; *Brown v. Lull*, 3 Sum. 443; *The Brookline*, 1845, 1 Sprague, 104; *The George Home*, 1 Hagg. 370; and *the Westmoreland*, 1 W. Rob. 227.

If, then, an effort be made to entrap a mariner, unwarily, into a bargain for a voyage which was not previously explained to him, by surreptitiously introducing into the shipping articles any unusual clause; or by otherwise changing their character; or by loosely describing the *termini* of a voyage; or by adding some indefinite expression which would obscure rather than render clear and distinct the course, character, and conclusion of a voyage, — any such effort, by whomsoever attempted, would be deemed in admiralty as the act of

an unscrupulous owner or shipping agent; and the shipping articles would be likely to be set aside, at least *pro tanto*, as derogating from that good faith which ought ever to subsist between merchant and mariner, or master and mariner.

By the statute law of England and the United States, a foreign voyage must be specifically described and distinctly defined. Nothing should be left to conjecture. The port of departure should be set forth as one of the *termini*: the port of destination as another; and if any intermediate or other ports are intended to be visited in the course of the voyage, it is imperative that they should be precisely designated, and not loosely, vaguely and indefinitely hinted at or implied, under such generality of expression as the term "elsewhere;" which term may mean something or nothing according to the course of trade, the custom of merchants engaged in a particular traffic, or the arbitrary will, discretion, or caprice of an enterprising ship-master or interested ship-owner.

Many of the cited authorities will be found to have special application to this branch of the inquiry.

All the authorities concur in stating that there are but two particular obligations which need be described in the engagement of the contracting parties: one the extent of the voyage; the other, the rate of wages to be paid during its continuance. Lord Stowell, in the *Juliana*, *supra*, had occasion to give an exposition upon this matter of the contract of seamen in the year 1822. The case of *Buck v. Rawlinson* had been previously decided and probably presented the earliest instance of an open attempt to deprive by law a mariner of his wages, under a special agreement of an unusual char-

acter. The agreement was, that wages should be forfeited if the vessel did not return to the home port or port of departure. At first this was attempted to be effected by means of a collateral bond, to be executed by the seaman on signing the shipping articles; but afterwards that stipulation was incorporated into the articles themselves, as part and parcel thereof. Both attempts signally failed; and the judicial exposition, given by Lord Stowell, of these abortive attempts, is both interesting and instructive, as tracing the history and progress of the admiralty practice in this behalf.

In the *Juliana*, William Lattimore shipped as a seaman in August, 1820, on a voyage from Portsmouth to New South Wales; thence to Batavia; thence to Bengal and back to the port of London. In the shipping articles was a clause to this effect: "that no officer or seaman should demand or be entitled to his wages, or any part thereof, until the arrival of the ship at London, and her cargo delivered." This was alleged in the pleadings for the defense. The *Juliana* returned to the Downs, 19th December, 1821; and on December 24th struck on the Kentish Knock, was wrecked, and all on board, except Lattimore and one other mariner, were lost. It was then, as Lord Stowell (p. 508) said, "a divided voyage, in which cargoes successively taken in, and delivered at different ports, earned freight for the owners at each port of delivery by the known general law; and, by the same general law, wages were earned by the mariners;" and (p. 511) he said, "where a voyage is divided by various ports of delivery, a proportional claim attaches at each of such ports; and the courts have upheld that title against all attempts to evade or invade it. The attempts have usually appear-

ed in the form of renunciations of this right, obtained from the mariners, without any consideration whatever advanced for this surrender. The first form, in which it was attempted, was in taking from them simultaneous bonds to that effect, at the execution of the usual contract. And, if the courts had supported these collateral instruments, the effect might have been this: that seamen might contract for a voyage of circumnavigation round the globe, might deliver cargoes at ten different ports, at each of which freight was earned by the owner, and then, if the ship had the misfortune of being lost, in her return home, upon the Goodwin Sands, they were to be turned adrift, if they escaped, without a single penny to face the debts which the necessary subsistence of their families had incurred during their three years' absence, on a service of fatigue and danger to themselves, though of great emolument to their owner."

As it was conceived that great misapprehension had prevailed upon the subject, Lord Stowell then stated a few leading cases to show that all British courts have concurred in discountenancing that attempt. He then refers to *Buck v. Rawlinson*, *supra*; *Edwards v. Child*, 2 Vernon, 728; *Bell*, Law of Scotland, vol. 1, p. 515; *ibid.* the case of *Ross v. Glassford*; *Appleby v. Dodd*, 8 East, 299 & 303; *Edward v. East India Co.*, 2 Vernon, 210; and analyses and comments upon the judicial expositions respectively of Lord Somers, Chief Justices Holt and Abbott, Mr. Justice Lawrence and Lord Ellenborough. He then observes: "The present question is, therefore, as far as I know, untouched; and this court is called upon, for the first time, to sanction this covenant in the contract, where it has no peculiar policy to support it, but stands upon the sole ground of ousting

the general law, to the dishonour of the mariners of this country. . . . I am not to forget the high authorities under which it has been uniformly held, that such a covenant *dehors* the articles, but executed at the very same time, and for the very same purpose, and in the very same terms, and by the very same parties, was unreasonable and unjust, and to be frowned upon by the law. . . . Does it become more reasonable and more just by being incorporated in the articles? How this might be considered in a court of common law, I cannot presume to predict.

“A court of law works its way to short issues, and confines its views to them. A court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case. This court (the Admiralty) does not claim the character of a court of general equity; but it is bound, by its commission and constitution, to determine the cases submitted to its cognizance upon equitable principles, and according to the rules of natural justice.

“There are those who perhaps might lament, if this humble class of suitors were compelled to a pilgrimage through a second court. This court is not disposed to impose that burden upon them; it will, as far as it can, protect these illiterate and inexperienced persons against their own ignorance and imprudence, and I confess I feel disposed to do so more in the case of mere articles than in the case of articles and bonds.”

He concludes substantially as follows:—“I shall say no more than that this is the first court to which this covenant has been directly presented; the facts of the case are such as cannot recommend it, I think, to any

court upon any discussion. But at any rate, I will not be the first judge on record who shall give it a sanction. I, therefore, reject this article of allegation; and shall of course proceed upon the summary petition; and, if it be duly supported by proof, shall feel myself bound by law, authority, and justice, to pronounce for the wages on the outward voyages."

In this manner, in England, were the first formal attempts to overreach, circumvent, and defraud, by skill and craft, the reckless but confiding mariner, stigmatized and checked. And it would seem probable that all such devices attempted in this country would be alike reprobated, particularly in the Massachusetts District of the First United States Circuit.

Indeed, it is quite certain from the published reports, that irregular shipping papers will find no favor in our admiralty courts; but, on the contrary, that any attempted imposition upon the mariner, in regard either to the voyage itself, or its terms, nature, extent, and continuance, will not only be discountenanced, but judicially frowned upon and rebuked. The cases of this description must necessarily be rare indeed. In England, there is a custom in the Baltic trade, to withhold from the seaman one half of his wages during such time as the vessel may be detained by ice in that sea, if she be compelled to winter there. And in the case of the *Hoghton*, (3 Hagg. 100), Sir John Nicholl, in 1833, upheld this usage, and allowed but one half wages for four months to the libeling seaman; but did not impose costs. With this exception, all the cases hitherto cited are in complete harmony, from the *Juliana* to the *Brookline*.

A recent case, reported in the Boston "Daily Adver-

tiser" of December 28th, 1867, indicates the probable convictions of the present able and learned incumbent of the District Court of Massachusetts. The report is doubtless incomplete ; and does not, therefore, fully present the technical defensive allegation most to be relied upon by the owners against the mariner's claims. Conjecture as to the precise state of the pleadings is unsafe, as both parties offered parole evidence to prove the terms of the voyage ; from which it may be inferred, that the shipping articles were either defective in description or an entire misdescription of the voyage.

The libellants allege it was to be a six months voyage from Boston to one of the Cape de Verd Islands, thence to Africa and back to the United States. The owners of the schooner *Ella Franklin* contended that their vessel was to proceed to Goree, Africa, as tender to another of their vessels ; there to be sold, and the crew to return in the other vessel ; and, as respondents, offered evidence to show this, and that the libellants were so informed at the time of shipping.

When the *Ella Franklin* arrived at one of the Cape de Verd Islands, two of the libellants were compelled to leave, and go on board the barque *Warren White*, against their consent ; where, on refusing duty, they were put on bread and water, and kept upon that diet, until the barque arrived at Bathurst.

At Bathurst the two were discharged by the consul as having been illegally shipped. When the schooner arrived at Bathurst, another seaman was dismissed ; and neither of the three men were allowed to remain with the schooner, though all desired so to do ; but all were discharged there, in a foreign port, without their consent. It did not appear, from the report, that the schooner was

sold. But the libellants declined to ship and return in the barque to the United States, though that privilege was proffered them. They were sent home by the consul, some weeks after. The three seamen sued the owners of the schooner for their wages, from the time of shipping till their return; and two of them sued also for damages for their illegal transfer to, and ill-treatment on board of the barque. The names of the parties to the suit are, *J. Collins et al. libts. v. F. C. Butman et al. respts.* It was held: 1. That the voyage was not legally described; 2. That all the seamen were unlawfully discharged at Bathurst; 3. That the transfer of two of them was illegal and so justified their refusing duty. And, in giving judgment, Judge Lowell decreed full wages to the three libellants, without deduction; and to the two transferred, \$2 additional per day for such time as they were kept involuntarily on board the barque.

This case is an extreme one in its principal facts and features, but the result well sustains the doctrine in the text; showing strongly the indulgent and paternal protection which, in admiralty, must ever surround the mariner. Such cases are, indeed, of rare occurrence; and not likely to be often repeated, after this decision of Judge Lowell.

Thus it is manifest that, in all cases, the admiralty courts will judicially interpose to protect the mariner against fraud or imposition. No scheme, however well devised for such purpose, will, by these courts, be sanctioned or encouraged. Whether the contrivance be to impair, abridge, or take away the mariner's general right to wages, or simply to suspend the payment thereof, through the instrumentality of special inde-

pendent collateral bonds, or by directly incorporating some equivalent special agreement to that effect in the shipping articles themselves, — either device would be deemed, under all the authorities, alike derogatory to the principles of maritime law, and the mariner's personal privileges under that law. Such devices, therefore, would be tolerated or sanctioned by no admiralty court. They would, if not steadily reprobated, inflict needless wrong and mischief upon the confiding mariner, who, as such, needs and deserves perpetual protection against the tried skill and superior intelligence of mercantile men, whose eagerness for gain may sometimes prevail over their sense of right, though it is hoped but rarely.

The mariner's contract is an ancient instrument; gradually moulded into its present form by the complexities and exigencies of commercial pursuits. It should not, therefore, be rashly or recklessly tampered with, *lucranda causa*: but must ever be permitted to remain, in the future as in the past, a nautical chart, invented specifically to define the *termini* of a voyage and prescribe its probable cost.

These two points, extent and expense of a voyage, should be approximately ascertained before sailing, and duly specified in the articles, that all engaged in the enterprise may, *velis levatis*, work with a will. The course of the voyage prescribed before leaving the port of departure, should be, in general, strictly adhered to. No voluntary deviation or departure is permissible, but by the mutual consent of the several parties. Accordingly, any considerable change, alteration, or deviation from the original enterprise, by one party, would partially release, if not totally absolve the other party,

from his contract stipulation. In such an event, should the master, of his own mere motion, and acting upon his own responsibility, materially modify and change the voyage, the mariner is at liberty, at his option, to stand by or abandon the master; obey or disobey; remain on board or quit the ship; and no neglect, refusal, or relinquishment shall thereby be deemed or construed to be an unlawful desertion, to which any of the penalties of forfeiture would justly attach.

It is not within the power or province of a master, as the owner's agent, to change at pleasure a specified voyage, without consulting the ship's company. What the mariner understandingly shipped for, that he is obliged to perform: whither he promised to go, thither he must proceed: but, in no case, can he be compelled, without new articles and upon modified terms, to begin or continue a new voyage.

In the matter of making his contract, the mariner is hedged in, surrounded, and shielded on all sides by the maritime law, and left free to act for himself. Neither the laws of Wisbuy, Oleron, the Hanse Towns, or the French or other codes, withhold or even temporarily withdraw from him this protection: and the modern improved legislation of England, as well as the ameliorated doctrines, now upheld in both the English and American admiralty tribunals, indicate how vigilant and unceasing are the judges of those courts in shielding and protecting the mariner from all wrong and imposition.

Indeed, good faith, on the part of the merchant or master, as the merchant's presumed agent, seems to be indispensable to uphold the mariner's contract in its integrity and entirety. Caprice, will, wanton change

or any substantial variation or spontaneous deviation from the specified voyage, may dissolve this contract; thereby absolve the mariner from his contract obligation, and leave him free to quit, at pleasure, his ship. This doctrine is as ancient as the ordinance of 1681, and has been universally accepted and uninterruptedly administered in maritime courts of established authority.

"Liv. 2, tit. 7, *Des Matelots*," and art 4 in the *Commentaire* of Valin on the French ordinance, is as follows:

"Si, toutefois, après l'arrivée et décharge du vaisseau au port de sa destination, le maître ou patron, au lieu de faire son retour, le frète ou charge pour aller ailleurs, le matelot pourra quitter si bon lui semble, s'il n'est autrement porté par son engagement."¹

The 24th article of the laws of the Hanse Towns also relates to a contingent and arbitrary change of a voyage by the master; and it provides, that he cannot steer another than the intended course without the previous consent of the crew, or paying such compensation as the major part shall adjudge to be due them for such changing of the voyage.

These ancient codes aptly chronicle what the maritime law, in this respect, formerly was; while the English and American cases, herein cited, will fitly illustrate what the modern doctrine now is. And all legislation upon this subject is but a codification, or reënactment of the preëxisting principles of maritime law, as found embodied in the foreign codes; but perhaps slightly

¹ "If, however, subsequent to the arrival and discharge of the vessel at the port of destination, the master or skipper, instead of making his return-trip, freights or loads to go elsewhere, the sailor may leave at pleasure, unless it be otherwise prescribed in his contract."

modified, in some instances, to meet the present wants and changed condition of commercial pursuits in modern times. Commerce was originally a species of barter; the products and commodities *in specie* of one country being exchanged by ship transportation, for the products and commodities of another country. Afterward, as in the East India trade, the shipment of silver dollars was the usual resort to procure from those climes their staple products and fabrics. Now, such is the course of trade and exchange, that the most valuable cargoes may be obtained from the most remote quarters, through bills of exchange, without a merchant's quitting his counting-room. All or nearly all may be accomplished by correspondence alone. Yet the instrumentalities for the employment, navigation, and preservation of the ship remain very much the same. There is the master to command and the mariner to obey; the voyage to be described and the wages to be specified; a contract to be signed and its terms to be complied with; and this contract if wholly reduced to writing, as it should be, is alike obligatory on master and mariner. Thus prepared, the contract is termed the shipping articles; and, as such, they were declared by 2 Geo. II., ch. 36, § 2, "binding and conclusive" upon the parties, in all cases where they shall have been framed to meet the ordinary exigencies of a sea-voyage; but not applicable to mariner's contracts of a special nature. *The Minerva*, 1 Hag. 347.

The shipping articles are then *prima facie* evidence touching and affecting the rights of all persons named therein. They are equally competent to decide controversies between owner and master; or mariner and owner or master. In *Willard v. Dorr* (3 Mason, 167),

they were held to constitute a part of the ship's documents for the voyage. Parties are, accordingly, as much entitled to their production in court, upon notice, as they would be to the production of the ship's log-book, under like circumstances.

No stipulation, inserted in them, if it be prejudicial to the mariner's general rights or privileges, or contrary to the maritime law, will be allowed to stand, unless adequate provision is also made for suitable additional compensation in behalf of the mariner. *Harden v. Gordon*, 2 Mason, 541.

In *Veacock v. McCall* (Gilp. 305), it was held, as a general rule, that parole evidence was not admissible to vary this contract for wages.

Yet if, from accident or mistake, but without fraud, the shipping articles happen to be silent as to the amount of wages to be paid, either party may introduce testimony to supply such omission. Gilp. 452, *Wickham v. Blight*.

And it is incumbent upon the owner to explicitly declare the ports at which a voyage is to commence and terminate. Gilp. 219, *McGee et al. v. Ship Moss*.

Deviations, however, which proceed from accident or overruling authority, do not abrogate the owner's contract with the mariner. And, unless something may have been done to supersede the contract, the mariner, in England, is required to stay by the ship until the cargo is discharged. But spontaneous deviations of importance, practically dissolve the mariner's contract, and absolve him from his stipulated allegiance, under it, to the ship; thus entitling him to a discharge, and justifying his abandoning the vessel, without the imputation of either actual or constructive desertion. *The Cambridge*, 2 Hagg. 243.

All vague descriptions of a voyage, as by employing the indefinite expression "elsewhere," are nugatory; being both a departure from the better recognized usage among mercantile men of high standing, and contrary to the requirements of the statute law, as well as in derogation of the general maritime law. In several cases, such interpolations were deemed void for uncertainty; as in the *Countess of Harcourt*; the *Minerva*, and the *George Home*. In the first, the void description was "to Van Dieman's Land, *viâ* Cork and elsewhere, and back to London:" in the second case, it was "from London to New South Wales and India, *or elsewhere*, and return to a port in Europe:" and in the third case, it was "from London to Batavia, the East India Seas, *or elsewhere*, and until the final arrival at any port or ports in Europe:" and in these three cases, all reported in 1 Hagg. pp. 248-347 and 370, it was substantially determined that the contract, being once defeated by loose description or misdescription of a voyage, could not subsequently be reinstated by one party; that it must receive a reasonable construction and limitation, extended or narrowed, according to the situation of the primary port of destination; and that no seaman, on arriving at Cowes, or in the Downs, could be compelled to proceed on a further voyage to Rotterdam (though such may have been agreed upon by the owners and the master); nor would a refusal to do duty during such voyage, from the Downs to Rotterdam, work a forfeiture of wages.

Indefinite description, therefore, is legally no description; because not conformable to the requirement of law. But, moreover, the mariner is entitled to be fully apprised in advance of the extent, nature, and direction

of the voyage. It is his right to know the precise voyage for which he undertakes to contract. If absolute precision be not attainable, then there should be an approximation to accuracy, as far as it can be applied to the subject of the voyage and the port of unlivery. However slight the alteration of the destination of the ship may be, the mariner is entitled to know it before signing the articles. *The Eliza* (1 Hagg. 186), and the three cases last referred to in same volume.

The articles are conclusive only as to the extent of the voyage and amount of the wages; but the admiralty may, on collateral points, consider how far they are just and reasonable. *The Prince Frederick*, 2 Hagg. 394.

In the *Crusader* (Ware, 437), it appeared "that the voyage for which the libellant shipped was a general trading and freighting voyage; without any particular designation of the ports to be visited; without any certain *terminus* of the voyage; and without any limitation of the time for which the engagement was made." p. 448.

"Such a contract must be liable to be dissolved by either party at his pleasure, subject to the equitable restriction, that this shall not be done under circumstances or at a time particularly inconvenient or injurious to the other party." p. 449.

And in the final disposition of this case, the eminent and conscientious jurist and judge of the United States District Court for Maine, adds, "If these principles are correct, their application to the case is obvious. When a seaman ships on a general trading and freighting voyage, without any limitation of time, and without any certain destination or fixed *terminus* of the voyage, and which may, at the pleasure of the master, be prolonged

indefinitely, the legal construction of the agreement is, that it is a contract which may be terminated at the will of either party. The master has, at least, the power of putting an end to it at any time, by putting an end to the voyage. And it is the dictate of common sense and common justice that the mariner should have the same right of dissolving the contract, by leaving the vessel at any time when this will not be productive of special injury to the master."

It may then be observed that, in general, when any novel, unusual, or extraordinary clauses are inserted in the shipping articles, or any special stipulations are there interpolated, which, from design or in effect, were calculated to impair the mariner's general rights, or derogate from his privileges as accorded to him by the general maritime law, such inserted clauses will be pronounced void; unless it shall also appear, at the same time, affirmatively,

First. That there has been a full previous explanation of the clause to the mariner before signing the articles: and

Second. That proper provision has been fairly made, to allow to the mariner such additional compensation as may be adequate to the new restriction or risk imposed.

When these several prerequisites coexist, they will together constitute a case of a special agreement; which is to be judicially interpreted accordingly. Under this agreement, the parties will have voluntarily assumed novel duties and liabilities, not provided for by the existing statute or general maritime law; and which, therefore, may come under the cognizance of the common law as well as the admiralty courts. If the con-

current jurisdiction of the former courts be invoked, the hazard is, that there may be found to exist some precise technical rule of law, inhibiting these courts from doing complete justice, as there was in the case of *Cutter v. Powell* (6 Term Rep. 320), even though the judges may be disposed to act otherwise. In that case inquiry was made as to the usage among merchants about paying *pro rata* wages to the estate of a deceased mariner, under a special agreement to do duty for an entire trip. But no satisfactory information as to usage being obtained, the court reluctantly enforced the law as to entire contracts; and decided that nothing was payable for the partial service; at the same time declaring, that if a usage to pay a proportional sum could have been proved, the decision of the court would have been made conformable to such usage.

Special and extraordinary agreements with the mariner are seldom salutary; and ought not, therefore, to be encouraged. No substitute for the shipping articles proper promises improvement or benefit for either party. Any imported novelty tends to engender jealousy, foment fore-castle discussion, and disturb the quiet, and thereby impair the discipline, on board ship. High-toned merchants are generally content to adopt the customary forms for hiring seamen; and therefore never attempt to innovate upon these ancient instruments.

In the United States, the act of Congress, for the government and regulation of seamen in the merchant service, contemplated that the shipping articles would constitute a several contract with each seaman, to all intents and purposes; and such has been the practical

administration of the law by courts of justice, and such the understanding of merchants and mariners in all modern commercial states. 6 Pet. 143, *Oliver et al. v. Alexander et al.*

It is better, in all cases, that these contracts should be in writing. The statutes of both England and the United States expressly provide for adopting and using written or printed articles. They do not, indeed, imperatively require this, by expressly declaring verbal agreements to be void. But, in order to prevent or avoid the mischief, which would often arise from a want of the proper proof of the precise terms on which a mariner agrees to do duty in the merchant service, legislative acts have been passed, prescribing, in certain voyages, special requirements, to which prudent masters generally conform.

Thus it is provided (§ 1, ch. 56, Acts of the U. S. 1790) that masters, before sailing, shall contract in writing with each seaman as to the terms of his voyage.

This is made applicable in terms: *First*, to all foreign voyages from the United States; *Second*, to general trading or freighting voyages, by vessels of one hundred and fifty tons or more, and bound from a port in one state to a port in any other than an adjoining state.

These provisions are not mandatory in terms; but any omission to conform to them may subject the master to a prescribed penalty of twenty dollars. Moreover, seamen so engaged may, at their pleasure, leave the vessel, at any time, during the voyage, without incurring the penalty of forfeiture or deduction of wages; besides demanding the highest rate of wages. And, though a mariner is generally subject to the general

maritime law, while he remains in service on board a ship, yet, in the absence of the customary shipping articles, he is not bound by the regulations, nor is he subject to the penalties and forfeitures contained in the acts of Congress upon this subject.

It is well and wise, therefore, for all engaged in foreign commerce in the United States, to comply invariably with the provisions of these acts of Congress. By so doing, they may avoid useless litigation; escape the possible imputation of striving to take advantage of seamen; and thus materially mitigate much mischievous and malevolent misconstruction. For, however unjustly it may be, the merchant has been charged with unworthily desiring to make money out of the blood, bones, health, and sometimes character of the mariner. Conformity to the well-known provisions of law in hiring seamen may, therefore, remove all occasion or pretext for such unfounded imputations and gratuitous misconstructions in reference to the acts of mercantile men, either omitted or committed.

Having thus, to some extent, treated of the utility, or rather inutility, of introducing into shipping articles unusual stipulations; the hazards to which such interpolated clauses tend to expose the parties; the matters upon which the shipping articles are deemed to be conclusive evidence, and how slightly seamen are legally held unless such papers are executed in the common form; it remains only to state what they usually contain, in addition to the description of the voyage and specification of the rate of wages, which they are required to contain. Ordinarily, there is inserted in the shipping articles the capacity in which the seaman ships to serve, and the time when he engages to render himself on board for the voyage.

These four particulars — namely : 1. Extent of the contemplated voyage ; 2. Rate of wages to be paid per month or trip ; 3. Capacity in which the seaman engages to serve ; and 4. Time when he agrees to render himself on board — are the usual specifications contained in the shipping articles : the two former are required by statute and are essential ; but the two latter are optional, and are not expressly required by statute. These four are the customary stipulations in the articles ; and all beyond them, unless it be the merely formal parts thereof, are wholly outside of what the law ever contemplated, the practice of courts requires, or the usage and understanding of merchants and mariners demand ; and, therefore, may be deemed or decreed supererogatory or nugatory.

Beside the first section of the act of 1790, and § 1, ch. 62, 1803, there are also several clauses or sections in chapters 23 and 48 of 1840, of the acts of Congress, and especially sections 1, 2, 3, 4, 8, 19, to which particular reference should be made, in order to show —

1. The agency of the collector of customs at the port of departure ;
2. The agency of consuls or commercial agents, resident at the foreign port ;
3. Mode of shipping seamen at foreign ports ; and
4. The use, purpose and character of the descriptive list of the crew anywhere.

In the United States, the duties of collectors are partly fiscal, clerical, ministerial, and executive. The office of foreign consul is partly representative, judicial, and advisory. Collectors constitute the nation's land police to guard the treasury against fraud by smuggling or otherwise ; secure the collection of import

and other duties ; enforce the revenue laws against the shipping interest, accord to merchants the proper facilities for clearance and entry of their ships, assure to seamen safe restoration to their homes, by giving them suitable protective papers, and taking from masters and owners certified descriptive lists of the whole crew or ship's company.

Consuls are resident representative agents abroad of the national government ; appointed to take especial care of its commercial rights and privileges and the mercantile interests of its citizens ; secure for seamen immunity from personal wrongs and oppression, by relieving them when in distress and protecting them from the effects of false imprisonment and illegal discharge in distant lands and other ill-treatment.

It has already appeared by § 1, act 1790, that one of the first duties, before sailing on a foreign voyage, is to provide shipping articles and have them duly signed.

By § 1, ch. 62, act 1803, the master is required, before a clearance is granted, to deposit with the collector a sworn descriptive list of the crew. Thereupon, the master is to obtain of the collector a certified copy of this list, and give bond that he will exhibit the same to the first boarding officer, on his return to the United States ; whose duty it is to ascertain, on boarding, that all the men named in the list are on board, and so report to the collector. If the vessel do not return to the same port, then the list, exhibited by the master, should be sent by the collector of the port of arrival to the collector of the port whence the vessel sailed, for the inspection and approbation of the latter.

By § 2, ch. 48, act 1840, it is required that the owners shall procure from the collector a certified copy of the shipping articles, containing the names of the crew, to be taken to sea with the vessel. Beside being certified to be true, this copy must also be written in one uniform handwriting, and without erasures or interlineations. And this, together with a fair, uniform copy of the descriptive list, which the master is required to procure from the collector, shall be deemed the documents in which is contained the conditions of the contract with the crew as to their service, wages, voyage, and all other things; and are to be exhibited by the master to any consul or other commercial agent of the United States, whenever, in any foreign port, such officer may desire them or either of them, for the purpose of ascertaining the contract rights and duties of such American seamen as may make application to him for consular aid or assistance. § 2, ch. 48, act 1840.

Neglect to take such documents, when proceeding on a voyage, or refusal to produce them in a foreign port when properly required so to do, will render a master liable in damages to all persons who may thereby suffer any injury; and also subject him to a penalty of one hundred dollars, which may be recovered by any person, who may sue for the same in any court of the United States, where such master may reside or be found. *Ibid.* 19.

And by the fourth section of the same act, it is provided and declared to be a rule of judicial construction, that all interlineations, erasures, or writing in a handwriting different from that in which such copies were originally made, are to be deemed and taken to be fraudulent alterations; and not to be regarded, unless

they shall be satisfactorily explained in a manner consistent with innocent purposes and the standing provisions of the law which are enacted to guard the seaman's rights and privileges.

Sometimes, by reason of desertion, death, impressment or other cause, in a foreign port, a vessel may become short-handed. In that case the master may be under the necessity of recruiting; and then the value and utility of the certified copies of list and articles will be made manifest; as all regular action to this end, by the master, must be made by direct communication through the resident consul or commercial agent. The master's first duty, in shipping seamen in a foreign port, will be to exhibit copies of the usual shipping papers to the consular agent.

Accordingly, by the eighth section of the same act, it is substantially provided, that whenever a master ships a seaman in a foreign port, he should immediately exhibit to the consul the list of the crew and the shipping articles; or, if there be no consul, then to the person who shall be in the discharge of the duties of the office at that port; which officer shall, thereupon, make the proper entries in these documents, setting forth the contract and giving a description of the person of the seaman. This being done, the master would be as much bound to return such seaman, shipped abroad, as he would be to return those seamen who had previously been shipped at the port of departure. In legal effect, therefore, the bond of the master, given at the home port for the return of seamen, may be deemed to include also any seaman shipped at a foreign port; provided that the master has proceeded circumspectly and conformed to the provisions of the law, in first exhibit-

ing the usual papers to the consul and procuring his official sanction by endorsement.

By the tenth section of the act of Congress, 1825, ch. 276, it is provided, that neglect to return, without cause, officers or seamen who could and would return, if not unjustifiably and maliciously left abroad, may subject a master to a fine, not exceeding five hundred dollars, and imprisonment, not exceeding six months, according to aggravation of the offense.

Thus it has been made to appear, that proper encouragement and protection is proffered by the legislators of the United States to induce mariners to enter the merchant service. Every preliminary paper seems to be framed to shield them from imposition; and all public acts are passed for the purpose of imposing penalties on such persons as shall attempt to defraud or otherwise misuse the mariner. Consuls to watch over his rights abroad, hospitals to relieve him when aged or sick at home, and almost every conceivable measure of relief and protection were early provided for by the national government; insomuch that the experience of quite three quarters of a century hath not disclosed defects in our first legislative acts which demanded any material modification of the principles then embodied in the acts of Congress. Indeed, the first section of the act of July 20, 1790, passed in less than a year after the adoption of the Constitution, yet remains substantially unchanged. Not only must the substance of the maritime codes of continental Europe have been well known at that time; but the authors who drafted that first act, then members of our national legislature, must have been familiar also with the principles and practice, recognized by the

Parliament and courts of Great Britain, in maritime causes affecting the mariner and his legal rights.

Though wrongs have been inflicted upon seamen, yet the decisions of the courts will show that redress has been promptly and amply meted out to him generally; and in every species of marine employment, whether merchant, fishing, coastwise, whaling, or other sea voyages.

Without further enlarging upon the contract as affecting the mariner's right to wages, before or after sailing, it is obvious that special duties devolve upon the mariner which he is bound to discharge, before he can in law be deemed entitled to wages. The performance of these duties, if performed agreeably to the mariner's engagement, generates his title to wages. All claim in this respect is founded on performance. The earning of wages is not dependent upon the earning of freight or any other like ancient dogma or speculative doctrine. Formerly it was otherwise, as has been seen in a preceding chapter of this treatise; but that notion is now exploded and become obsolete.¹ Therefore, under this branch of the subject of mariners' wages, it is sufficient to repeat what was stated at the commencement of the present chapter, that if a seaman has performed his stipulated duty, he has thereby earned his wages and is entitled to be paid his wages; unless it shall be made to appear that, for some cause or causes, well known to the law, he may have lost his right thereto by forfeiture.

Forfeiture of wages may follow the mariner's misconduct, incompetency, dishonesty, infidelity, desertion, or other shortcomings, according to the nature or extent of his alleged demerit, whatever it be.

¹ *Ante*, p. 117, *et seq.*

Reference may elsewhere be made to the loss of wages by a loss, abandonment, suspension, or other interruption of the voyage. At present the discussion shall be confined exclusively to the consideration of those acts or that conduct of a mariner which works forfeiture in whole or part. And it is well to premise that Story, Ware, and Sprague all concede, and the latter expressly affirms, that the extent of the forfeiture, when incurred, is matter within the discretion of the court. With the judge is lodged the power to mitigate; in the exercise of which power he may so discriminate, as to dispense with a part of the penalty of forfeiture, and still inflict it in part; or he may, for good cause, dispense with the entire forfeiture. This is the necessary effect and logical sequence of confiding to judicial discretion, which is totally incompatible with the restraint of any iron rule or the duty of enforcing it. The power to mitigate penalties, remit forfeitures, and pardon criminals, flows from the same sovereign source; that is, the exercise of judicial discretion.

An executive, in exercising the pardoning power is uncontrolled by rules; reasons with himself, acts for himself, and finally decides for himself, by following, it may be, the impulse of his own personal feelings, without so much regarding, for the time, certain public considerations, which might lead others to an opposite conclusion.

So, in enforcing the revenue laws, a secretary of the treasury may or may not remit a forfeiture at his pleasure; in other words, may do as he pleases, or act according to his discretion. He is neither under any restraint or constraint of law or authority; standing unaffected by any influence save that of his own will, pleasure, or arbitrary discretion. To this there is no

just limitation. If a public officer may remit a part, he may remit the whole of the forfeiture; if an executive can pardon in one case, he may in another; and if a court can reduce a penal sum to a definite and limited extent, why may it not reduce it to an indefinite and unlimited extent?

Just so is it, in cases of desertion; if there exist any power to mitigate a forfeiture at all, it must necessarily be unrestrained except by judicial discretion.

In *Coffin v. Jenkins*,¹ Mr. Justice Story declared, in general terms, the doctrine to be, that desertion is, by the maritime law, an absolute forfeiture; and subsequently, in the same case, stated that the forfeiture may be mitigated, in certain specified contingencies, such as ill treatment of seamen, offer to return to duty, or severity of officers.

In at least three different cases,² Judge Sprague held that the court was not bound by the maritime law, to decree forfeiture of all antecedent wages. And in this he was sustained by Judge Ware in *Gifford v. Kollock*.³

The case of *Gladding* was decided in 1834. In regard to forfeiture of wages, Judge Sprague said: "There is no inflexible rule requiring the court to withhold wages for a refusal of duty; but they may look into the circumstances, and exercise a sound judicial discretion, according to the merits of the case."

The case of *Loverein v. Thompson* was heard in 1857. In that the same learned judge said: "Even in the case of a seaman of full age, a desertion merely, under the

¹ 3 Story, 109.

² 1 Sprague, 73, *Gladding v. Constant*; *ibid.* 355, *Loverein v. Thompson*; *ibid.* 427, *Swan v. Howland*.

³ 19 L. Rep. 21.

general maritime law, does not necessarily work a forfeiture of all antecedent earnings; it is a matter within the discretion of the courts."

And in the third case, *Swain v. Howland*, decided in 1858, Judge Sprague said: "The doctrine that the court is not, by the maritime law, bound to decree a forfeiture of all antecedent earnings, is not new in this court. I have held it in several former cases."

It would seem, then, to be conclusively established by high authority, that there exists no inflexible rule requiring a court to inflict the penalty of a total forfeiture of all antecedent wages, when the time or occasion for imposing forfeiture shall occur; but it is even discretionary with the court to graduate the sum to be forfeited according to the circumstances. The power to do so is conceded and the right to do so has been expressly and repeatedly asserted. Judge Story has admitted the power in certain specified cases; Judge Sprague has exercised the right on all occasions; and he has been sustained by Judge Ware.

Whenever, then, the defense of desertion is to be set up as a ground of forfeiture of a mariner's wages, it is material to ascertain fully all the facts, and the whole history of the voyage, so far as it may affect the offending seaman. His personal acts and conduct are chiefly to be drawn in question. He shipped to serve and faithfully stay by the ship, for and during the voyage. This he was bound to do; and not quit without leave. Should he, during the voyage, wrongfully abandon his ship and duty, that abandonment is desertion, actual or constructive; and, whether the one or the other, it would be equally operative to work a forfeiture of the wages then earned.

Much, therefore, depends upon the facts, in settling this question of desertion, which is defined to be of two different descriptions.

First. There may be an actual desertion, which, by the maritime law, is deemed general.

Second. There may be a technical desertion, which, by virtue of the act of Congress, may be termed a statute desertion.

If a mariner abandons his position, *animo non reverendi*, and does not in fact return to his ship or her service, that absence would constitute an actual or general desertion, according to the recognized principles of the maritime law.

But if a mariner, without permission first obtained, voluntarily absents himself from his ship, during the voyage, more than forty-eight hours at one time, having signed proper shipping articles, he is then liable to forfeit all the wages due to him, and all his goods on board ship or stored where they may have been lodged at the time of such absence, beside being subject to pay damages, sustained by the owner or master, in hiring a substitute; and this act of abandonment may be designated as the offense known as a technical or statute desertion.

To make this latter offense complete, it is essential that the deserting seaman should be "*logged*" as it is called; that is, the master or officer, having charge of the ship's log-book, is required by § 5, act 1790, to enter in it, on the day on which the sailor absents himself, the name of the sailor, and that he is absent without leave.

Unpermitted and unexcused permanent absence constitutes actual desertion; and the like species of ab-

sence, exceeding a definite period of time, though not permanent, and officially noted, constitutes a statute desertion.

To both are attached the same penalties substantially; and either may be followed by absolute or qualified forfeiture, at the court's discretion. In the exercise of this discretion, judges indulge in no harsh construction of acts or motives of seamen; but ordinarily view them with a liberal and humane disposition. This course, coupled with the paternal legislation of Congress, can hardly fail to assure and extend to seamen the utmost personal protection in law against fraud, imposition, or oppression.

Both the decisions and legislation of England and the United States are at the present time, nearly, if not entirely in harmony, in reference to the default of desertion by seamen. It must be willful and not compulsory; an absence without and not with leave; avowed and without apology; persisted in and neither repented of nor atoned for. The presence of these ingredients render it a legal desertion, to which will attach its prescribed penalty, forfeiture of wages.

And first let the English decisions be referred to, in which the courts determined what was not desertion, actual or constructive.

In the *Castilia* (1 Hagg. 59), a mariner shipped on board of a collier, to go from Shields to London and back; but at London he quit in consequence of not being supplied with provisions. Lord Stowell held, that for such abandonment of his ship the mariner should not be visited with a forfeiture of wages; and accordingly, in suit to recover, he pronounced for the wages.

In *Sigard v. Roberts* (3 Esp. 71), seamen, having gone

ashore on duty with the boat, requested permission to remain to get some victuals; were refused, and the boat returned to the vessel without them. The seamen subsequently offered to return to duty. Desertion was set up as a defense; but it was held that such absence did not constitute a legal desertion.

In the *George* (1 Hagg. 168 *n.*), the *Eliza* (ibid. 182), and the *Frederick* (ibid. 211), it was held that, though desertion was pleaded or attempted to be established, yet, in neither case, was the attempt successful; and there was no such absence as would be followed by forfeiture attaching to a legal desertion.

In the *Agincourt* (1 Hagg. 281), the defense set up was desertion by the ship's cook, who got into a frolic on shore, and was imprisoned as a disorderly person, but released on the master's application. Held, the defense could not be sustained.

In the *Minerva* (1 Hagg. 368), seamen, being harshly refused leave, went ashore to complain; but the master anticipated them; first made complaint, and had them arrested and confined twenty-five days in the House of Correction. Held, no forfeiture of wages attached to such a retirement from the ship.

In the *Ealing Grove* (2 Hagg. 15), mariners, on leave, went ashore, got drunk, and did not seasonably return. Held that such absence did not amount to a legal desertion.

In the *Two Sisters* (2 W. Rob. 138), it was held, that, to constitute a total desertion, entailing a forfeiture of wages, it must be proved or capable of inference from the *res gestæ* of the case, that the seamen shall have left the ship *sine animo revertendi*.

In the *Westmoreland* (1 W. Rob. 222), a refusal of duty by mariners is not desertion, but insubordination.

In this connection a few references will be made to American decisions.

In *Cloutman v. Tunison* (1 Sum. 373), desertion is very precisely defined, and the well known qualifications as to its legal effect touching seamen are fully stated.

Grave as is this offense in legal contemplation, yet it is not presumed to be unpardonable, like incapacity or incompetency. But, on the contrary, the law recognizes the existence of such a quality as condonation, being applicable to desertion as an offense; and holds in reserve a *locus penitentie* for an impulsive mariner. Should the mariner practically repent of his rash act of deserting, and proffer amends therefor by returning to duty, all penal consequences are thereby obliterated, and the seaman is restored to his legal rights and to wages.

If he voluntarily return, and is, thereupon, received and admitted to duty, such return and admission efface, purge, and cancel all the offense of desertion.

The ill effects of desertion are, in various ways, removed by subsequent dutiful conduct on the part of an offending mariner. Sometimes, an actual return, or proffer to return to duty, suffices to efface the crime or infidelity which draws after desertion the penalty of forfeiture.

In case desertion shall be set up as a defense, condonation may be replied; and, if proved, it mitigates the original wrong, and relieves from its penal consequences, a heedless or reckless, but still humbled and subdued sailor; especially when the supposed fault or alleged short-coming is, in its nature, a pardonable offense.

Although return to ship's duty will reinstate a de-

serting seaman, and tender of satisfaction and submission ought ever to operate favorably in behalf of one who has committed a venial fault; yet this doctrine cannot be held to be universally applicable. Humane and kind as this may seem in principle, there are and must be exceptions. For some transgressions there can be no apology, and should be no excuse or pardon; for these therefore there can be no condonation. Thus it has been held that no amends or satisfaction can be made for a disqualification or incapacity. In *Black v. The Ship Louisiana*,¹ Judge Peters held that "want of honesty is a disqualification, and not a pardonable fault in a steward, to whom are committed the necessities, conveniences, and comforts of those on board.

"If a steward is an habitual drunkard, if he grossly wastes, purloins and sells the stores committed to his charge, it is lawful for the master to dismiss him. He renders himself unworthy of further trust, and is unfit for so confidential a station. If dismissed, the master ought not to be compelled to receive him again."

Nevertheless, desertion *per se* is not of this class or description of faults and may, therefore, at any time, be condoned.

In 1798, *Whitton et al. v. The Brig Commerce* (1 Pet. Adm. 160), Judge Peters there gave a very early reading upon the subject of statute desertion and condonation. There the seamen, on the occasion of some difference with the master, voluntarily went on shore, for which they were "logged" as having been absent forty-eight hours continuously without leave. The accuracy of this entry was denied by the seamen. A reconciliation, however, took place; and they were again received on board, and returned to Philadelphia; where suit was

¹ 2 Pet. Adm. 269.

brought against the master and owners of the Commerce for the balance of wages due.

At the hearing, the log-book entry was produced and relied upon in defense; but not permitted by Judge Peters to avail the respondents. His opinion, as reported, is remarkable for its singular felicity of expression and tone, as well in forgiving the numerous faults and frailties, as in vindicating the few paramount rights of seamen. In the course of it, this learned judge observes that "seamen are deemed the sinews, or more aptly in our ships, called 'the hands,' of naval power, strength, and security. Without the aid of this intrepid and hardy class of men, under national government and protection, commerce might be annihilated. They are encouraged and protected by all the maritime laws, for other and more extensive national purposes, as well as for those in which commercial individuals employ, and profit by, their services. Their frailties are by these laws forgiven; and their offenses, so far as these affect contracts, are pardoned, on repentance, compensation, or offer of amends and return to their duty." This eminent judge then adds that, "Public policy and private justice, as it is fit they should, here move together."

Condonation, therefore, has been judicially recognized as the avowed and peculiar privilege of the seaman for the full period of seventy years in the United States. By the case last referred to, a reception of a deserting seaman on board for duty was deemed to be a waiver and pardon of former forfeitures. This effort to repel the seamen's claims to wages, antecedent to the date of the log-book entry, by force of which wages might be forfeited, was pronounced to be an "attempt at sever-

ity," which the law would not justify; Judge Peters observing that "It is much to be desired that all our mercantile citizens better understood those principles of the maritime laws, which, in courts of justice, we are bound to follow. Crimes and offenses of seamen are rigorously punished; but mariners, with all their too numerous faults, are considered, by all maritime nations, objects of national concern. Their contracts are placed under the cognizance of national courts, bound to proceed by fixed rules, and circumscribed by principles of law."

The case of the *Commerce*, being one of the earliest decisions and judicial readings on desertion and condonation, has been drawn upon liberally. It was pronounced by an eminent American judge in the same year that a distinguished English judge (Stowell) commenced his brilliant judicial career, during which he pronounced a series of decisions, which covered a period of time from November 6, 1798 (when Christopher Robinson reported his first decision), until December 13, 1827, when Mr. Haggard reported his last decision.

At the date of Judge Peters' decision, therefore, he was entirely destitute of those helps which others may now derive from the many reported cases in the English Admiralty Reports published during the present century. Judge Peters was then a pioneer in this branch of American jurisprudence; obliged to lead the way in these investigations; and form his own judicial interpretations in practically applying the principles of the foreign codes. Still this great magistrate successfully grasped, and seemed to fully comprehend, not only the general principles, but also the minute details, of those ancient repositories of the principles of the maritime law.

Certain it is, that Judge Peters' mode and manner of dealing with desertion as a marine offense, and the effect of condonation in mitigating its penalties, strikingly indicate that magistrate's proper appreciation of the offense, his own full and comprehensive knowledge of maritime jurisprudence, and a just regard for the privileges and rights of the mariner; and the result is, that if a mariner do desert, he renders himself liable to a total forfeiture of his wages: how far such forfeiture shall extend, whether to the whole or only a part of his wages, depends upon the mitigating circumstances in the first place, and ultimately rests with the discretion of the court, by which the matter is to be tried.

Forfeiture inevitably follows desertion, whether general or statute desertion, unless the mariner shall, by tendering amends, have thereby purged the offense of its criminality; and so exempt himself from the penal consequences of desertion. For generally, a remission of the penalty of forfeiture may be secured by seasonable submission. But then it must be seasonably made; for if there be no amends offered until the master shall have incurred the extra expense of engaging a substitute hand, the submission will be too late and condonation will not legally follow. *Vide* 1 Pet. Adm. 160.

And in many other cases, qualifications and modifications of the general doctrine occur; and several decisions in Peters' and Mason's Reports will be found useful and instructive. Unless the desertion be voluntary, forfeiture will not accrue. Compulsory abandonment cannot be legal desertion. The essential ingredients of the legal offense are wanting. Thus where seamen are compelled to leave the ship by cruelty and oppression, wages are nevertheless recoverable; for in that case

there could be no technical desertion. 1 Pet. Adm. 136, Relf et al. v. The Maria.

Where a seaman has deserted, if the master receive him again, and subsequently give him a discharge, with an acknowledgment that he is entitled to his wages, it is a complete purging away of all the previous forfeiture. 1 Mason, 45, Emerson v. Howland et al.

So, as in the Commerce, *supra*, if a mariner be again received on board, a forfeiture previously incurred is remitted. 1 Pet. Adm. 160.

A voluntary abandonment of duty usually amounts to desertion, drawing after it a forfeiture of wages. 1 Pet. Adm. 129, Boardman et al. v. The Elizabeth.

So a mariner, as has been seen in the case of the steward of the Louisiana (2 Pet. Adm. 268), may forfeit wages by an habitual course of misconduct, or by a single act of gross dishonesty or aggravated infidelity.

We have now seen what desertion is ; what its effect is on the mariner ; how the mariner may be reinstated by acts of repentance ; and when and how condonation follow submission.

In Cloutman v. Tunison (1 Sum. 373), desertion is defined with precision and accuracy. It is the voluntary abandonment of the ship and duty, without permission and in violation of his contract obligation, by a mariner, with no intention of returning, *animo non revertendi*.

There are other grounds and causes of forfeiture of wages besides desertion, some of which will now occupy our attention to a limited extent.

First. Embezzlement is an offense on board ship of the gravest character, and entirely incompatible with

the contract stipulation of the mariner, in reference to his respective duties to the ship, owner, and master. The mariner's contract imposes upon him, as has been substantially stated elsewhere, three several duties: 1st, fidelity to his ship; 2d, honesty towards the owner; and 3d, obedience to the master. Disregard or neglect of duty in either of these particulars by a mariner is a positive marine offense, and may be visited on him with condign punishment, or subject him to those well known penalties, recognized by the maritime law, forfeiture or deduction of wages, or render him liable in damages, to a reasonable amount, adequate to repair the actual and ascertained loss, if not also to make good the probable contingent damage.

From the condition and pecuniary circumstances of the common seaman, no indemnity, beyond the amount of wages due, can be relied upon or looked for. Hence, the only penalty attaching to the breach of trust, known as embezzlement, is ordinarily limited to forfeiture, or deduction of wages. Practically it goes no further; although there may exist a technical liability for damages in the way of indemnity; yet a case will seldom arise to warrant pursuing this latter remedy, in behalf of an owner.

Embezzlement of stores or cargo is a direct wrong to the owner. Every mariner stipulates for honesty toward his employer; and at sea, no portion of the owner's property can be abstracted, misapplied, or misappropriated, without justly attributing its disappearance to persons on board at the time when the abstraction, be it by theft, larceny, or conversion, took place. The charge can only be imputed to the officers, crew, or passengers, if any, on board; and the investigation by

the master will be necessarily confined to a limited number of individuals. If the inquiry result in fastening the offense upon a single mariner, then such mariner is held responsible to the extent of his ability, according to the discretion of the admiralty judge, in passing upon the question of wages. If, on the other hand, the offense cannot be traced directly to one or more individuals as the guilty parties, then the entire crew may be held responsible; in which case, they would be compelled to contribute, each in proportion to the amount of wages due, and that proportion to be secured by withholding so much, in the shape and name of wages deducted.

There are several American leading cases which sustain the statement of the doctrine already advanced; and which are worthy of further attention.

Thus, in *Bee*, 182, *Sullivan v. Ingraham*, if the innocence of one of the crew shall be affirmatively and satisfactorily established he will be relieved and exempted from any contribution toward an embezzlement.

So *ibid.* 262, *The Brig Fanny*, it was settled that, if none of the crew could be individually inculpated, all of them should be held chargeable for loss by embezzlement.

In 1 *Pet. Adm.* 239, *The Ship Kensington*, several persons were hired in Liverpool to help stow the cargo of a Philadelphia ship. A box of cambrics and lawns was put on board, part of which was embezzled, probably at the time of stowage of the cargo, as might be presumed from the appearance of the box having been much injured and broken open with a crow-bar or other similar instrument. The cambrics were of considerable

value ; and, on the return of the ship, at Philadelphia, the crew libelled for their wages. The owners repelled their claim by insisting upon deducting a proportional sum from each seaman, sufficient to make good the loss occasioned by the embezzlement of the cambrics and lawns.

The question argued was, whether the seamen were liable and should be held responsible for an embezzlement, which might have been perpetrated by the hired laborers of Liverpool, to whom was assigned the duty of stowing that part of the cargo, of which the plundered box composed one article.

Judge Peters declared the policy of the law to be, to hold the mariners, engaged for a voyage, to be responsible for each other ; but it is not applicable "when occasional laborers or other strangers, commit depredations, without the fault, negligence, or connivance of all or any part of the crew." He, therefore, rejected the doctrine urged by the owner's counsel that, if the hired laborers committed the depredation, they were, *pro hac vice*, a part of the crew ; and so the whole were responsible, and pronounced it not warranted.

But some of the crew, it appeared, mixed with the laborers, and all of them had access to the pilfered box. In the absence of evidence, it was difficult to determine whether the depredation was a separate or joint act ; and in this uncertainty, the court considered that the law threw the burthen of proof upon the mariners, to show clearly by positive evidence or strong circumstances, that it was the act of persons not of the crew. And under the circumstances, he was of opinion that the seamen should respectively contribute their

proportion of the loss. Judge Peters observed: "It would give an opening to dangerous and ruinous collusions and frauds, if mariners were discharged from their responsibility, merely because occasional laborers were hired to assist in loading a ship." And in a note to this case, it is stated that "frequent decisions have been had, on the principles of this case. Where the crew are mixed with strangers, it behooves them to be peculiarly watchful; though in some instances it is severe on mariners. I have generally suspected *collusion*, when I have enforced *responsibility*."

In the *Fair American* (1 Pet. Adm. 242), the reading of the court is as follows:—

"1. That although an embezzlement of part of the goods lost be fixed on some of the crew, who must pay separately to the amount proved; yet they or the surplus of wages, if forfeited, or in the hands of the owner, remain further answerable, in a general contribution for the balance.

"2. That the whole must contribute, according to their respective wages, the captain and officers of the ship included.

"3. Nor is any one to be excused from this general contribution, though absent from the ship, and not in a situation to be capable of assisting in the plunder. This point occurred in the case of one of the seamen, entitled to wages, who was confined in prison, during the period when the transaction happened. The innocence of an individual is not the question; it turns on the joint obligation of all, to make retribution; it is part of the conditions upon which they engage in their occupation."

In a note to this last case, the court says that in some

extensive embezzlements, it has held that the actual perpetrator forfeits all right to wages. Yet it has not been deemed right to inflict so rigorous a forfeiture; as the point of toleration or punishment is confessedly difficult to ascertain. When the wages of the real depredators shall be forfeited, they go to the relief of the innocent members of the crew. Total forfeiture applies only to cases of heavy plundering, and not to petty pilfering. Fraud and embezzlement must be clearly proved and fixed on a party, before he can be held responsible. 1 Pet. Adm. 99, *Brevoor v. The Fair American*. And when all are compelled to contribute to losses by embezzlement, this obligation arises from the contract in part; the mariner's duty under it to be honest and faithful; and their situation, which enables them to have free access to the articles embezzled. Therefore, if not themselves the actual perpetrators, they have the possible means of knowing who were; and, if vigilant, could disclose the names of the culpable party. In default of making such disclosure, a general liability is devolved upon all, and contribution ensues as a penalty (*in pœnam*) in the form of deduction of wages by the owners, on settlement at the termination of the voyage.

Substantially, this form of indemnity is the only available security within the owner's reach; as the mariner is ordinarily destitute of any other pecuniary resources than that of wages due, and the abstract technical right of the owner for damages would seldom (if ever) be worth pursuing.

Accordingly, this power of deduction is lodged with the owner, measurably, as his sole means of security against fraudulent depredations upon the stores or cargo of his ship. If the ship happens to be his own,

entirely manned, victualled, and laden by himself, then all loss by plunderage or embezzlement falls exclusively upon such owner. But, if he employ his ship as a general ship, or send her on a freighting or seeking voyage, then it would be otherwise to a certain extent. If employed as a general ship, and fitted out and sailed by the owner, taking on board shipments from other parties, then the ship-owner is answerable over to the shippers, who may have suffered in the course of the voyage, from the fraud or other culpable conduct of the crew, in wasting, consuming, or otherwise appropriating, without leave, any portions of such cargo shipped by others.

Whenever an owner shall be thus called upon to reimburse a shipper for loss occurring on board a general ship by embezzlement, his ready resort is to a deduction of wages for his security; and this deduction, unless the actual perpetrator be known, is to be made from the wages of all the crew, in proportion to the respective sums due to each. But if the real perpetrator be known, then contribution shall be levied upon him to the extent of a total forfeiture of his wages due. But in no case are the innocent part of the crew to contribute for the misdemeanors of the guilty. 1 *Mason*, 104, *Spurr et al. v. Pearson*.

In case of uncertainty, the burden of proof of innocence does not lie upon the crew; but the guilt of the parties is to be established, beyond all reasonable doubt, before the contribution can be demanded. *Ibid*.

And if the embezzlement be clearly shown to have been the act of the crew, but the individual perpetrators be undiscovered, and, from the surrounding circumstances, presumptions of guilt apply to the entire crew, then all are to be deemed liable. *Ibid*.

But, if no fault, fraud, connivance, or carelessness shall be proved against the crew, and no reasonable presumption be shown against their innocence, then the loss should fall entirely upon the master and owner. *Ibid.*

Mariners are not answerable for losses, except so far as they may be personally affected with fraud, negligence, or inattention. But if portions of the cargo be embezzled by the fraud or negligence of a mariner, he will become chargeable for the value thereof; and the amount of such abstraction may be deducted from his wages. *Gilp. 461, Edwards et al. v. Sherman.*

But in the *Test* (3 Hagg. 315), where there was proof of a bottle of spirits being seen in a mariner's chest, it was held to be insufficient to sustain a charge of embezzlement, working a forfeiture of wages.

Though an act of embezzling is a reason for withholding a proportional part of the wages of a mariner, yet it does not necessarily work a forfeiture of the whole. *The Malta*, 2 Hagg. 172.

In a claim for wages, preferred by a steward, and opposed upon the ground of a deficiency in the linen, charged as embezzled or lost by his negligence, it was held, that proof of the loss was not sufficient; but that it must be shown, also, that the articles had been delivered into his custody, and that the deficiency was imputable to him. *The Lady Campbell*, 2 Hagg. 10.

In taking leave of this subject of embezzlement, it may be observed that the true security against it is to enjoin upon the mariner that part of his stipulated duty which requires him to be honest towards the owners. An observance of this injunction will subserve the double purpose of protecting the mariner from for-

feiture and the merchant and master from felony or fraud.

Incompetency is another ground for forfeiture or other penalties.

All who ship on board of a ship, to serve in any capacity, ought to be reasonably well qualified for such service; either from natural aptitude for the duty, which they undertake to perform; or else by reason of previous nautical experience, acquired in sea service.

Incompetency and incapacity are both disqualifications; which may subject the party either to forfeiture or deduction of wages, and possibly to justifiable dismissal and discharge from ship and service. No discharge, however, would be justifiable, unless it were for adequate and manifest cause. Without such cause, a master's arbitrary discharge would be wrongful; and a tortious dismissal, instead of working a forfeiture, only remits the mariner, without performance of service, to his legal right to full wages; with, possibly, the statute penalty of two months' additional pay.

Good cause for discharge is legal ground for forfeiture, and *vice versa*, inadequate ground for discharge furnishes no sufficient cause for forfeiture of wages.

Hutchinson v. Coombs (Ware, 65), is an exemplification of the insolence of petty power, in master and mate, unduly elated with its possession and their office, which is sometimes exercised injuriously to the interests of commerce and the merchant; and which is always so carefully guarded against by the marine law.

Several cases may be referred to, showing that "any cause, which will justify a master in discharging a seaman during his voyage, will deprive that seaman of his wages." Abb. Sh. 456-7.

In *Hutchinson v. Coombs*, Judge Ware (p. 70), says : "That a master has, by the marine law, a right to turn a mariner out of the vessel, is admitted." But this he cannot do for slight or venial offenses ; and certainly not for a single offense, unless it be of a very aggravated character.

A master may discharge a seaman, when he is incorrigibly disobedient, and will not submit to duty ; or is mutinous and rebellious, and persists in such conduct ; or is guilty of gross dishonesty, as embezzlement or theft ; or is an habitual drunkard, stirring up quarrels and broils, to the detriment or destruction of discipline among the crew ; or, by his own fault, renders himself incapable of performing his duty. *Vide* 1 Pet. Adm. 175, *Thorne v. White* ; *ibid.* 168, *Relf et al. v. The Maria* ; 2 *ibid.* 262, *Black v. The Ship Louisiana* ; 2 Ch. Rob. 216, *The Exeter* ; and 4 Mason, 84, *The Mentor*.

A mariner, therefore, may incur the penalty of forfeiture of wages, by an habitual course of misconduct, neglect, fraud, or disobedience, or by a single act of gross dishonesty or aggravated infidelity. *Ibid. supra*, and 4 Mason, 541, *Orne v. Townsend*.

As compulsory desertion does not, so a wrongful dismissal will not work a forfeiture of wages. Indeed, in law, the two are equivalent acts, injuring none but the master who promotes and perpetrates them, and perhaps, through the master, the blameless owner, who is compelled to tolerate, if not justify, the ill advised action of his agent, the master.

So far from forfeiting his wages, a mariner, if driven to absconding, by a master's cruel and oppressive treatment, is entitled to be paid his full wages up to the prosperous termination of the voyage. Ware, 109, *Sherwood v. McIntosh*.

So it is with a tortious discharge, which works no forfeiture, but when proved to be tortious, remits the sailor back to his legal rights and wages.

The right to remove, discharge, displace, degrade, disrate, or disgrace officers or seamen, is the offspring of necessity; *first*, to maintain proper discipline; and *second*, to secure efficient service on board the ship. The mere whim, will, caprice, or pretext of a master to exercise this right would find no favor, either with the admiralty or common law courts. To justify a resort to so delicate and dangerous a power, more than ordinary prudence and discretion are requisite to render its exercise safe and salutary.

It is imperative that, at sea, all hands shall work and serve skillfully, according to the grade for which each shall have severally shipped; whether that grade shall be mate, able seaman, ordinary seaman, light hand, or boy. In whatever situation any one stipulates to serve, his capacity should be equal to his station. All delinquency is noticeable, and likely to be logged to the discredit of the party. If all faithfully fulfill the several duties for which they engaged, then the law does not permit them to become the objects of a petty tyranny or victims of a spiteful caprice.

On the quarter-deck it is the business and right of a master to command; as it is also the duty of every mariner on board ship to obey all lawful and proper orders.

In the master's absence, or when below, the mate succeeds to the command and has full charge of the ship. This officer should be, in all respects, competent for his respectable position; and all hands should be capable and willing to perform their respective duties.

A ship, well manned, presents the best ideal of a sea-going craft, sea-worthy and safe, suited to cross the waters and contend with all weathers. In vessels of this description, well-victualled and manned, and in other respects sea-worthy, there is seldom any occasion for discharges, disratings, desertion, dismissal, or deductions; and, accordingly, none whatever to invoke the aid of the law to inflict the proper penalties.

If, on the other hand, officers or men are unequal to their station; incapable, incompetent, or indisposed to perform their several duties, then there springs up a crop of those uncomfortable marine offenses, so incompatible with quietude, content, and good order on ship-board; and during or at the end of the voyage, it becomes a necessity that the law should interpose and impose suitable penalties of forfeiture, damage, or deduction.

In these investigations, the courts hold the scales of justice and usually with a firm hand. If there be a voluntary abandonment, without cause or provocation, then the penalty of desertion occurs, and is pretty sure to be inflicted. If a master shall causelessly or capriciously degrade an officer, discharge a mariner, or cruelly dismiss and leave behind in a foreign port, any of the ship's company, his conduct will be inquired into, on his return home, and judicially rebuked and reprobated.

Caprice does not justify and will not sustain a master in the exercise of intolerance and practice of cruelty.

In the *Duchess of Kent* (1 W. Rob. 285), it was held, that a chief mate, suing for his wages in the Admiralty Court, was bound to show that he had discharged the duties of that situation with fidelity to his employers.

Among the more important of these duties, may be enumerated a due vigilance, care, and attention to preserve the cargo from robbery ; but a chief mate is not responsible for any embezzlement that may occur, not arising from any neglect of duty on his part.

As wrongful dismissal and compulsory desertion constitute no bar to a recovery of wages ; so no tortious removal, displacing, disrating, or degrading of an officer is permitted to operate to the prejudice of the party injured. However plausible may seem to be the master's pretext, the real motive, cause, or occasion is usually traceable to some sudden ebullition of passion or outbreak of personal prejudice.

Beside the cases already referred to, and especially those in Gilp. 83 ; 4 Mason, 541 ; 1 Sum. 151 ; 1 Pet. Adm. 244 ; and 4 Wash. 338 ; one or two other unreported cases will be cited for the purpose of exhibiting with what condign severity the intolerance and petty tyranny of masters in disrating officers may and have been rebuked by judges and jurors in Massachusetts, both in the State and the United States courts. They may be useful, not only to students, but to practitioners.

The first, *William C. Fauvel v. Horace H. and George W. Jenks*, master and owner of the ship *Rome* of Salem, was heard by the late Judge Davis of the United States District Court in 1836. The following is a brief statement of the facts, as will be seen by examining the allegations in the libel, vol. 20, Book of Records, pp. 491 *et seq.* to 500.

The libellant shipped as second mate of the ship *Rome*, then bound on a pepper voyage to Sumatra, in September, 1834. Nothing occurred to mar the har-

mony of the voyage until the year following, 1835, when the libellant was arbitrarily removed from his station as second officer; ordered forward, badly beaten, and imprisoned in a hastily constructed box or closet, between decks of a pepper ship, fully laden, with but little light and no air. His money, adventure, books, opium, and other goods were taken from him; the libellant himself hurried ashore to prison, at Singapore; and there left behind after the Rome sailed for her home port.

The confinement on board and ashore and other abuse, covered a space of about one hundred and seventy days. R. Choate and D. Roberts for the libellant; L. Saltonstall and J. H. Ward, for respondents.

There was a full hearing at the trial; many depositions were read, counsel heard on both sides, and the case defended with the utmost ability and persistency by the counsel who represented the respondents.

On the 5th of August, 1836, Judge Davis, after a full hearing of the case, upon the facts proved and the arguments of counsel, and mature deliberation thereon had, did adjudge and decree that the libellant recover of the said master and owner, the balance of wages due, the value of the articles detained, estimated at two hundred and thirty-two dollars, with costs, and damages awarded for the imprisonment, assault and other personal injuries, to the amount of two hundred dollars; making, for wages, property, damages, and taxable costs, the whole amount to exceed the sum of one thousand dollars; about \$1,050.

The \$200 damages for personal wrongs, was said, at the time, to have exceeded largely any amount of damages ever before awarded by this eminent judge.

Another case occurred in a Boston brig, the Robert Wing, Captain Skinner being master and Mr. Bartlett owner. It was similar in some of its features to the preceding case; it was not, however, settled exclusively by the Admiralty Court of the district, but was partly tried there, and partly in the State court.

Francis M. Ashton shipped as chief mate of the Robert Wing, October 15, 1861, and in that capacity sailed for Africa from Boston, October 25, on a trading voyage. While on the coast, he was causelessly removed, without previous notice, admonition or any assigned reason, as was alleged, on the 11th day of February, 1862. He was, afterward, or at the time, ordered forward, and kept there with a crew of blacks forty days, compelled to live on unwholesome food, and in violation of his contract, as he said.

For the recovery of his wages, a libel was brought in the District Court against the owner, and the brig was arrested. In this suit, a decree was entered by Judge Sprague for some \$52 or more, with costs.

But for the wrongful removal and other personal wrongs, the mate elected to bring his suit against the master for damages and to appeal to a jury in the State court. In this tribunal, where the case was fully examined and argued, the jury returned a verdict for \$500 as damages. A motion was made for a new trial upon the ground of excessive damages; which was argued by the counsel for the defendant, before C. J. Allen; who, however, declined to hear the other side in reply, and refused the motion.

Although the experiment of going before two tribunals, in Ashton's case, was not a failure, but as a chief mate wrongfully disrated, he was amply vindicated; yet

the better way, ordinarily, is to submit all causes of grievance, in one suit, to the decision of the Admiralty Court. The experiment of appealing to a jury may be warranted in some special cases of unmitigated wrong and outrage, as there is a concurrent jurisdiction in the State and United States courts in this respect.

If the jury reasonably remunerated Ashton, the chief mate, for his injury, certainly Judge Davis did ample justice in the Admiralty Court to Fauvell, the injured second mate.

In removing or disrating an officer, the act of removal should never originate from prejudice, or be prompted by passion, personal pique, caprice, or whim of any description; but should be dictated solely from a sense of duty on the part of the master. The master, though he may have the power, should never exercise it in an arbitrary and oppressive manner, to the personal annoyance and mortification of a person who has been deemed by the owners, and accepted also by himself as suitable and competent to fill the station of an officer.

This right of removal, which is vested in the master, as a disciplinarian, is not to be abused; but so delicate and dangerous a power should be wielded with caution and circumspection, on grave occasions only, but never for trivial or frivolous pretenses. Should a master be guilty of such abuse of this right and power, he then becomes a mere petty despot; a discredit to his profession; an unprofitable servant to his employers, and manifestly unfit to be charged with the responsible duty of the command of a ship.

Instances of the display of this insolence of office ought to cease. No man, at his own pleasure, can

legally or justly break up a mutual contract. It is not only right and proper, that some substantial reason should be assigned for a summary dissolution of a mariner's contract, but it is, by the law, rendered imperative that such reason should be seasonably assigned and made known by a master in advance. The inferior is, at least, entitled to notice or admonition from his superior. And if an offending master should not vouchsafe that much to his mate, or other unoffending officer, then the ill-advised and precipitate conduct of the master will become a subject of the severest scrutiny and the most rigid and unsparing criticism by a court of admiralty. Neither owner nor master should be exposed to imposition by false representations or by fraudulent professions. Mariners must manifest a capacity and skill equal to the station, which, by the shipping articles, they undertake to fill. The Duchess of Kent, *supra*.

In the *Orizimbo* (1 Pet. Adm. 250), the court said: "The true ground of all such inquiries is, whether or not there has been fraud and imposition practiced? If this fact be made out, the contract is not binding on the party deceived. This is a principle, both in the common and maritime laws. If one ships as an officer or mariner, and, either expressly or impliedly, professes himself a mariner capable of thoroughly executing the contract, and it turns out otherwise,—this court is in the constant habit of denying wages entirely, or allowing a *quantum meruit* according to circumstances. The proof of such false professions must be made, and the fraudulent conduct designated in some satisfactory way.

"However desirable it may be, that an officer shall have gone through every grade of the occupation to

which he is devoted, it often happens that those who have not practically or manually acquired their knowledge of all the duties of mariners, are among the most intelligent and trustworthy masters and officers of ships.

“Other qualifications than those of mere seamanship are required in those who act as officers of ships; and the court has had too frequent opportunities of perceiving, that many of those who are capable before the mast, are miserably incompetent on the quarter deck.

“Qualities not commonly discovered by mere seamen, are here indispensably called forth.”

In *Atkyns v. Burrows* (ibid. 244), a chief mate was dismissed from his rank. That a captain had a legal right to displace a mate for just cause, Judge Peters found to be a doctrine conceded, when he first came into his court.

It is established by the maritime laws, and so ought to be, that the captain must be supreme in the ship. His lawful orders must be obeyed.

But, when a contract is in question, the law, by its proper courts, will see that it is not vacated for any other than legal, reasonable, and necessary causes. The courts will control and examine the powers and conduct of the master.

The master is empowered to give all lawful and proper commands for the government, preservation and navigation of the ship; but he has not the authority to nullify a contract, at his will and pleasure, or for light and trifling causes.

The mate is a respectable officer of the ship; generally chosen with the consent of the owners; under the

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orders, indeed, of the master, in his ordinary duties, but his contract is not subject to arbitrary control and dissolution.

Causes for removal should, therefore, be evident, strong, and legally important. A mate may forfeit his right to command and wages, by fraudulent, unfaithful, and illegal practices ; by gross and repeated negligence, or flagrant, willful and unjustifiable disobedience ; by incapacity, brought on him by his own fault, to perform his duty ; or palpable want of skill in his profession.

It is, therefore, plainly incumbent upon a master to exercise all his powers with prudence and discretion. Precipitation, impulse, or passion are not desirable qualities to be exhibited by a master. As a disciplinarian, in the exercise of the power of removal, a master should be as circumspect as, we have elsewhere seen, he is obliged to be in making sale of his ship, in a foreign port, under a legal necessity ; or in furnishing supplies and necessaries, when in distress ; or in procuring loans by bottomry or hypothecation, in order to speed the voyage. Generally, his position calls for and demands discretion, not rashness ; judgment, not impulse or passion ; deliberation and not precipitation. A model master aims to discover business traits and qualities, and not to display imperious will.

Under difficulties, a master should be as cool and collected, as, it will hereafter appear, he is required by law to be considerate and paternal in inflicting punishment, in cases justifying that extreme remedy. And he should never vindictively remove, disrate, dismiss, or abandon and leave abroad in a distant foreign land, either officer or seaman, except for causes and reasons the most cogent and conclusive to justify him.

Embezzlement, incompetency, disobedience, drunkenness, insubordination generally, have been shown or will hereafter appear, by the cases cited, to be adequate cause for removal from office, and forfeiture or deduction of wages.

But there are other marine offenses, which might be enumerated ; some of a more, and others of a less aggravated character. Every act, which tends to interrupt the proper and legitimate employment of a ship, or to impede her navigation and dispatch, or is, in any way, detrimental to discipline, may be deemed a violation of the duty of a mariner and in derogation of his contract.

Performance, as has been stated, comprises all which can be designated as sea-service or maritime duty of a seaman. For this he should ever be ready and willing, and fully qualified for his grade and station, whatever that may be.

In case of any mishap to a master, the chief mate should be competent, as the rightful successor, to take the situation of the master, *cum totis oneribus* ; the second mate should be qualified, in like manner, to take the position of a chief mate ; and a third mate (if any), likewise should be qualified and competent to succeed to the station and duties of second mate. And this theory of rank, subordination, and succession, in sea-going vessels, is one of the established and permanent securities of merchants in particular, and commerce in general. All of these officers should be either thoroughly instructed or practically experienced, in making and taking observations at sea, by night or day ; keeping the run and course of the ship, and capable of navigating her, if need be.

So likewise, the able seaman must not only be fitted to hand, reef, and steer, but should be qualified also, from previous training practice, to splice, knot, or otherwise mend, the rigging or sails, if repairs be needed.

The cooper, and carpenter, sailmaker (if any), cook, and steward, should each be trustworthy, neat, skillful, prompt, and diligent, in the discharge of their several duties.

Ordinary seamen, at the time of sailing, should be capable of steering the vessel, handing, reefing, and furling the sails; and, in other respects, generally as handy as the able seaman, saving that not quite so much is usually expected, or can properly be required, in neat, advanced, and expert work on the rigging, from the ordinary as from the able seaman.

Of the light hands, boys or green hands, some are to go aloft, and take in the light sails generally; while all should hold themselves ready and willing to perform these required duties and labors with promptitude and dispatch.

The salvation both of ship, cargo, and life even, may often depend upon a prompt discharge of these different duties, for which all hands stipulate to be competent, on signing the shipping articles. Performance by the mariner of his own particular service is essential to success in all maritime adventures; and it is that performance which, *per se*, entitles the mariner ultimately to compensation.

Other delinquencies, it is obvious, of a lesser grade in morals, may interfere with the good order, become incompatible with the economy, and highly detrimental to the discipline of the ship, such as negligence, drunkenness, insubordination, and insolence to master or officers.

The presence and appearance of any of these evils are obstacles, which are likely to retard temporarily or break up permanently, a partly completed voyage. Whether their existence be transient or prolonged, depends much upon the manner in which they may be met by the master in charge of the vessel. If, upon their first manifestation, the master shall promptly encounter them with decision, deal with them energetically, but always judiciously, their continuance may be short-lived ; and if thus early checked, their correction may be enduring for the voyage. Should, however, these delinquencies be manifested in an aggravated form or habitually, they would legally draw after them the additional penalties of forfeiture or deduction.

Disobedience, open and defiant, is the deadly foe to discipline. Unchecked, it may lead to lasting and incurable evils. It disturbs the harmony, interrupts and impedes the progress, destroys the pleasure and possible profit of a voyage, and may, ultimately, render it disastrous to all concerned. This offense, beside being a legal and substantial ground for forfeiture or deduction of wages, is also closely allied to those other higher and more aggravated marine offenses, rendered positively criminal by American legislation. Mutiny and revolt, or the endeavor to create and stir up mutiny and revolt, are classed in the same category with piracy.

Positive proof of either of these offenses would not only incur the penalty of forfeiture, but also expose and possibly subject the delinquent to indictment and punishment by the proper tribunal, under the United States laws.

To check, therefore, these evils at their first exhibition on board ship, is a grave duty for the master, as a

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disciplinarian. Energy, decision, promptitude, and circumspection are the desirable qualities demanded for so difficult and delicate a duty. To meet this exigency and properly discharge his office, the master may legally resort to coercion. To assert his own authority and vindicate his right to command, a master may lawfully resort to the extremest measures. He may confine, punish, coerce, flog, indeed do almost anything, which necessity may impose as a duty upon him, or a proper self-defense will justify, in order to suppress rebellion against his rightful authority, put down mutiny, root out revolt, or nip in the bud any attempt at either mutiny or revolt. The authority of a master must not be overthrown by combinations, force, menaces, or intimidations; and whatever shall become necessary to uphold and assert his authority, that the master may justifiably do. Coercion, thus applied, is for a higher purpose than mere discipline. It would be coercion applied with a view to reduce dangerous insubordination, and to continue the master's control over his ship.

An individual defiance may be met by moderate and ordinary punishment; but a tumultuous and turbulent spirit, breaking out on board of a ship, disregarding all authority, and defying command, demands instant suppression; and, therefore, requires summary coercion. To dally with it, would necessarily result in the extinction and overthrow of the master's supremacy. That once overthrown, nothing but confusion, disorder, and danger afterward reigns. And, if such extreme measures shall be necessarily resorted to by a master, in order to quell a mutiny and repress a revolt, the end surely ought to justify the means.

If a single seaman manifest a disobedient, mutinous,

or refractory disposition, then the master may chastise him. But in that case, the correction should only be in proportion to the aggravation of the offense; or adequate to reduce the offender to due submission.

Such was the law, as formerly expounded by Story, Stowell, and other conspicuous admiralty magistrates, that the master might moderately correct a delinquent mariner, as a father would correct his child. His chastisement should be paternal; inflicted in a spirit of justice, tempered with mercy. It should never be wanton, cruel, brutal, vindictive, or excessive. The power to punish was formally upheld to the extent of reinstating order, checking abuses, reforming the refractory, and reducing to obedience a stubborn and defiant disturber of quiet and discipline. Within this just limitation a master is confined, and, for any excess, he was amenable, in law, to damages for all personal injuries caused by him, should he transcend or exceed this limit.

And cases are reported, and already referred to, in which damages, for the infliction of corporal chastisement, have been awarded, both by courts and juries, to heavy amounts.

Prior to September 28, 1850, the master was not legally restrained in the choice of his method or means of punishing. He might seize a rope's end, resort to the cat, make a spread-eagle of the offender by tying him up in the rigging, and then laying on the lash by the dozen. Still, even then, the chastisement should not be excessive. And the great danger attending the exercise of this power was, that it might be abused; and all punishment, administered in a passion, would be likely to become vindictive and excessive, by so administering it.

In the *United States v. Freeman* (4 Mason, 512), Judge Story is reported to have said: "The law does not permit the master to gratify a brutal and low revenge; or to inflict cruel and unnecessary punishments. It upholds the exercise of authority only when it is for salutary purposes; where punishment is applied, the master is responsible, both civilly and criminally, if he wantonly exceed the measure of justice."

Elsewhere, the same learned judge, in the same case, said: "If obedience does not follow command, the master may compel it by punishment; and the nature and extent of the punishment must be determined by the exigency of the case."

And for the purpose of reforming and reducing refractory seamen, at sea, the foregoing seems to be a generally correct statement of the law as it was formerly held, in reference to the master's power to punish and its exercise. Prior to 1850, this doctrine was unqualified and unrestricted. But on the 28th of September of that year, the Congress of the United States, in "making appropriations for the naval service for the year ending June 30, 1851," stowed away in an appropriation act, a provision (by way of amendment) of a very important character, to this effect, and in these words: "That flogging in the navy and on board of vessels of commerce be abolished after the passing of this act."

Since this enactment, all punishment by flogging, either on board of government or merchant ships, has measurably ceased. If doubts be expressed as to the expediency of this legislation, they will be likely to be removed by recalling the historical fact, that no remonstrance has been presented to the national legislature

against the abolishment of flogging on board of American ships, or petition forwarded to that body for a restoration of the former law.

Moreover, it does not appear that any serious evils have practically resulted from a discontinuance of the barbarous and formerly tolerated practice of flogging.

The chief inconvenience which may possibly arise from its discontinuance is the duty necessarily imposed upon all masters, to curb their passions, conquer their prejudices, practice prudence and humanity, and thus elevate themselves above the level of mere creatures of impulse; and thereby secure from the seamen a more willing obedience, for the ship better discipline, more harmony, and for the owner quicker dispatch. And this obedience, discipline, harmony, and dispatch, thus secured, cannot fail to abundantly compensate merchant and master as well as mariner for this modification and now admitted amelioration of the maritime law. To the merchant this reform guaranties shorter and more expeditious voyages; to the master relief from his most disagreeable duties; and to the mariner exemption from suffering which only passion or caprice could inflict.

No embarrassment can be supposed to be the result of this new legislation. It cannot certainly be greater to masters of merchant ships, than it has proved to be to naval officers. And if the latter have been successful in maintaining discipline, by a substituted and mitigated mode of punishing, in cutting off supplies or denying rations and other privileges, it is difficult to perceive why the master of a merchant ship may not be equally so. If, by putting a mariner on a short allowance of food, denying him necessaries or luxuries, confining him below or imposing on him other restraints,

has been found to be effective as a mode of reforming the refractory in the navy service, why may it not be equally so as a punishment in the merchant service ?

This substituted species of chastisement has proved to be quite adequate to displace the barbarous and abhorrent practice of flogging ; and thus, this country is making rapid strides to a more advanced civilization ; our growing republic leading the way, and, by its example, abrogating the antiquated dogmas and ameliorating the harsh usages even of monarchical England. Perhaps the influence of the daughter upon the mother country is in no aspect so observable, as in the silent and steady following of the latter in the track of the former, as affecting the administration of the law, and its practice in the courts of admiralty. This is especially noticeable in reference to some leading American decisions, which are accepted not only as authoritative but conclusive.

But the old mode of inflicting punishment on mariners, borrowed or inherited from the parent country, our American Congress unceremoniously and summarily abolished, as has been seen, in 1850, not only in the navy but merchant service.

Since then, by ch. 186, passed in the year 1855, March 2 (*vide* vol. 10, p. 627, U. S. Sts. at Large), provision has been made for the inflicting of ameliorated punishment on board of ships of war in the American navy, in lieu of flogging.

The third section of that act, enjoins upon commanders of the navy, in granting temporary leave of absence and liberty on shore, "to exercise carefully a discrimination in favor of the faithful and obedient."

Section 4, provides that summary courts-martial may

be ordered on petty officers and persons of inferior ratings by the commander, when a greater punishment is deserved than a commander is authorized to inflict by his own authority ; but not sufficient to require trial by a general court-martial.

Section 7, makes provision for the various substituted sentences which summary courts-martial may impose, as follows :—

First. Discharge from service, with bad conduct discharge, but sentence not to be carried into effect in a foreign country :

Second. Solitary confinement in irons, single or double, on bread and water, or diminished rations, provided no such confinement shall exceed thirty days :

Third. Solitary confinement in irons, single or double, not exceeding thirty days :

Fourth. Solitary confinement, not exceeding thirty days :

Fifth. Confinement not exceeding two months :

Sixth. Reduction to next inferior rating :

Seventh. Deprivation of liberty on shore on foreign station :

Eighth. Extra police duties and loss of pay, not to exceed three months, may be added to any of the above mentioned punishments.

And this system of regulated, limited, and qualified punishment is to be observed and enforced on board of all vessels belonging to the American navy ; and it is difficult to perceive why it may not be entirely adequate to subserve the exigencies of the American merchant service, and maintain good discipline there.

It has now been made to appear, what are the rights and duties of mariners ; how far they are bound by

their contract, and under what circumstances that contract may be legally dissolved ; how, by performance, they may earn and be entitled to the payment of wages ; how they may incur the penalty of forfeiture and deduction of wages by misconduct or special delinquency ; when, on the termination of a voyage, they may claim payment ; for what cause they may render themselves liable to punishment ; and to what extent and in what manner the master may now legally inflict punishment for inattention, disobedience, infidelity, insubordination, or any other act or course of conduct which may be incompatible with good order, and detrimental to discipline on shipboard.

What other persons stand in the relation of mariners to a ship, and are entitled to the rights and privileges of such as shall render a maritime service and as such may sue for wages, may be seen by reference to a few well known authorities.

The admiralty has jurisdiction over contracts for the hire of seamen, where the service is substantially performed on the sea. Bee, 199, *L'Arina v. Manwaring* ; Gilp. 529, *Thackarey v. The Farmer* ; 10 Wheat. 428, *The Jefferson* ; and 7 Pet. 324, *Peyroux v. Howard*. But the jurisdiction does not exist, unless the service be essentially maritime.

Steamboats and lighters engaged in trade or commerce on tide-water, and the seamen employed on board, are within the admiralty jurisdiction. But it is otherwise with ferry-boats, and those engaged in ordinary traffic along the shores. Gilp. 203, *Smith v. The Pekin*, and *supra*.

In *Wilson v. The Ohio* (Gilp. 505), it was held, that the pilot, deck-hands, engineer, and firemen, on board

of a steamboat, might sue in the admiralty for their wages. But as to musicians *aliter*.

A mariner, though he be a part owner, may sue in the admiralty for his wages. *The Pilot* No. 2, Newb. 215.

A claim for wages by a woman who had actually served in some useful capacity on board of a vessel, was sustained in the *Jane and Matilda*, (1 Hagg. 187): subsequent discoveries or surmises, however, rendered the soundness of this decision questionable or suspicious. Nevertheless, the principle there recognized by Lord Stowell has been judicially sanctioned in the United States by Judge Ross Wilkins, Jr. Newb. 5, *Emily Segeman v. Sch. Brandywine*, where it was held, that a woman might serve as a mariner and become entitled to wages as such.

A steamboat clerk may sue for wages. 4 Md. Ch. Dec. 310, *Abbot v. The Baltimore and Rappahanock Steam Packet Co.*

Stevedores cannot sue in the admiralty for wages. 1 Wall. Jr. 370, *McDermott v. The S. G. Owens*.

But a master, as factor, may libel for wages. 3 Mason, 161, *Willard et ux. v. Adm. Dorr*.

Not only are stevedores disqualified for suing in admiralty for wages, upon the ground that their services are not essentially or substantially maritime, but seamen even, upon other grounds, may labor under a similar disqualification. In the case of an illegal voyage, or an unauthorized expedition, a claim for wages will constitute a lien on the vessel for security and payment of wages. Edw. 35, *The Leander*; 2 Mason, 58, *The Langdon Cheves*; 2 Hagg. 158, *The Malta*.

So in the *Vanguard* (6 Ch. Rob. 207), suit for wages,

arising *ex turpi contractu*, was not sustained. In this case it appeared by the report that W. Taylor, having been hired to act as mate, further agreed that, for various purposes in the clearing out of the vessel, he would act as ostensible master. For this additional duty he was to receive £50 extra. Among the various purposes, one was stated to be that Pince, the real master, had such a reputation for cruelty, that he would not be able to have procured men.

And the objection was taken that such an agreement was repugnant to the provisions of the act of Parliament, regulating the slave-trade. Sir W. Scott, in 1805, therefore held it to be a *turpis contractus*; which would defeat any application to obtain the aid of a court of justice to carry it into effect. He further observed: "It is not for me, sitting here, to reprehend the policy or the morality of a trade which is continued to be permitted by law; but it is certainly my duty to keep as rigidly as possible to the letter of those provisions, which the wisdom of the legislature has framed by way of salutary control over the manner in which it is to be conducted."

Opportunity was given to Taylor for explaining the circumstances, in order to show that he had entered into the agreement from an innocent motive, and without the design of producing any mischievous effect. This was done by pleading an additional article; upon which the court said: "That the explanation offered, instead of affording any excuse, is an aggravation of the offense;" and "on every ground I am of opinion that the petition is inadmissible." See also 9 Wheat. 409, *The St. Jago de Cuba*.

A suit for wages was brought on the part of Gillman,

a British pilot, for conducting an American ship from the Downs to Flushing in 1806. The court, desiring to hear *in limine* how suit could be maintained for services performed, in aiding the commerce and importation of the enemy, added, "It would not give any support to a demand arising out of a course of navigation, which must be pronounced to be illegal to a British subject."

Wages may be lost by a loss of the voyage, by capture, or in some cases, by a suspension, or interruption of the voyage, occasioned by a *vis major*, over which the mariner has no possible control. In *The Saratoga*, 2 Gall. 178; 2 Mason, 319, *The Two Catharines*; and 2 Sum. 443, *Brown v. Lull*, much useful information may be found as to the mode of dealing with mariners' wages, where there is an unanticipated interruption of a commercial enterprise. In the latter case, it was held, that a dissolution of the contract for wages does not necessarily follow on the capture of a neutral ship, but a suspension only. The capture may be wrongful, in which case, a restoration may be decreed, either in *specie* or value. If restoration be decreed of the ship itself, then the contract is temporarily suspended, to await the ultimate adjudication of the proper tribunal to return the vessel to the owners, with costs and damages for the unlawful seizure and detention. In such a case the lien for wages will not have been permanently lifted, but still adheres to the ship; which, when restored, becomes liable to the payment of all wages due.

If the ship cannot be restored in *specie*, but the seizure has been wrongful or without probable cause, then restitution in value should be decreed by the court;

and such decree would be carried into effect by the government or state becoming responsible for the value thereof; and the owners, on receiving such value, will be answerable to the mariners for wages; and, if not paid, the mariners' lien will legally attach to the proceeds.

In case of capture and recapture, the right to wages is only suspended; and on return to the home port, the mariner is remitted to his wages, his right to the same being thereby revived.

But in the *Two Friends* (4 Ch. Rob. 143), it was held, that recapture did not revive the right to wages of a mariner, who upon the capture of the vessel, had been taken out by the enemy, carried to France, and did not happen to be on board at the time of recapture.

So wages for the whole voyage cannot be recovered by a seaman, who is impressed into the king's service, out of a vessel on a voyage, unless it shall appear to have been done by the malicious acts of the master, or of those under his authority. *The Jack Park*, 4 Ch. Rob. 308.

Seamen, staying by a ship, when captured, at the master's request, recover their whole wages, if the ship be released; but if she be condemned, then they lose their wages. 2 Sum. 443, *Brown v. Lull*.

If the voyage be lost by a fraudulent or uncalled for deviation, then seamen are entitled to their full wages for the voyage. *Bee*, 173, *Lindsey v. Ship S. Carolina*.

In case of disaster, the mariner is entitled to his wages as far as the fragments saved will go towards it. 1 Hagg. 227, *The Neptune*.

While seamen remain on board, doing duty, they are entitled to wages. 1 Pet. Adm. 129, *Boardman et al. v. Brig Elizabeth*.

Where seamen leave by reason of cruelty, they are entitled to wages for the voyage. Ibid. 193, Relf et al. *v.* Ship Maria.

Having thus reviewed the principal subjects and decisions touching the contract, right and loss or forfeiture of wages of mariners, the next chapter will treat especially of the competency of sailors and others as witnesses in the admiralty courts.

CHAPTER XI.

WHAT PERSONS MAY BE WITNESSES IN ADMIRALTY.

WITHIN the past fifteen years, a great change and amelioration of the law in regard to the admissibility of witnesses, has been effected in the admiralty practice of the Federal courts, by the liberal legislation of the different States of the American Union.

Formerly the rule as to competency and interest, was as inflexible in the admiralty as in the common law courts. Interest alike operated as a disqualification in both tribunals. A departure from this rule of evidence, in any case, was permitted upon the ground of necessity or by reason of some other known, well established, and generally recognized exception.

Thus, salvors were "admitted *ex necessitate* as witnesses to all facts which are deemed peculiarly or exclusively within their knowledge ; but to other facts, they are incompetent ; on the general ground, that they are both parties and interested. The exception arises from the necessity of trusting to their testimony or being left without proof ; and it is admitted no farther than this necessity exists." 3 Greenl. Ev. § 412.

On the same principle, parties are admitted as witnesses in prize cases.

So generally, where the cause of action is established *aliunde*, and the loss is proved to have been occasioned

by the fraud or tortious act of the defendant, nothing remaining to be shown except the value of the property lost, taken away, or destroyed, being incapable of proof by any other means, it may be ascertained by the oath of the plaintiff.

Such was the general rule, and such the character of the exceptions, when Mr. Greenleaf published, in 1853, his third volume on Evidence.

Three years afterward, (in 1856,) chapter 186 was passed by the legislature of Massachusetts, making parties admissible as witnesses in civil cases, and applicable to all cases, except where the original party was dead, or an executor or administrator was a party.

In 1859, on error before Judge Curtis, in the case of the United States *v.* Josiah Dunham et al. (21 L. Rep. 591), it was denied that the statute of Massachusetts was binding on the Federal courts, as being incompatible with § 31 of the United States judiciary act, passed in 1789; which section provides that "the mode of proof by oral testimony and examination of witnesses, in open court, shall be the same in all the courts of the United States; as well in the trial of causes in equity and admiralty and maritime jurisdiction, as of actions at common law."

Judge Curtis then said: "The purpose of this provision was, not to introduce a law of evidence respecting the competency of witnesses; but a mode of proceeding by examination, in open court, of such witnesses as should be competent under the appropriate rules of law; and to apply that mode to all the classes of cases over which the courts of the United States have jurisdiction." He considered it to be settled by the authority of the cases of *McNeil v. Holbrook* (12 Pet. 84), and

Sims *v.* Hundley (6 How. 1), that the State laws of evidence are rules of decision in civil trials, at the common law, under § 34 of the act of 1789. See also 12 How. 361, *United States v. Reed et al.*; 1 Sprague, 486, *The Ship William Jarvis*; 1 Black, 430, *Vance v. Campbell*; *ibid.* 435, *Haussknecht v. Claypool et al.*; 2 *ibid.* 537, *Wright v. Bales*.

By § 34, Congress provided "that the laws of the several States, except when the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

Thereby and thereupon, the laws of the several States became rules of decision; but not to affect the remedy of parties; and in 10 Wheat. 24, *Wayman v. Southard*, the Supreme Court of the United States held, that the congressional provision did not apply to the process and practice of the court; it merely furnished a rule of decision, and was not intended to regulate the remedy.

But more recently, in 1862, July 16, by chapter 189, Congress went still further; and then enacted that "State laws are rules of decision as to the competency of witnesses in trials at the common law, equity, and admiralty."

And in July 1865 (*vide* vol. 12 of the U. S. Sts. at Large, p. 351), Congress made the further provision, "that in the courts of the United States, there shall be no exclusion of any witness on account of color, nor in any civil action, because he is a party, or interested in the issue tried."

Meanwhile, in passing the General Statutes in 1860, the Massachusetts legislature reenacted substantially

the former State law of 1856, with some slight additions, but no substantial alteration.

Section 14, ch. 131, Gen. St., is as follows : "Parties in civil actions and proceedings, including probate and insolvency proceedings, suits in equity, and divorce suits (except those in which a divorce is sought on the ground of alleged adultery of either party), shall be admitted as competent witnesses for themselves or any other party ; and in any such case in which the wife is a party or one of the parties, she and her husband shall be competent witnesses for and against each other, but they shall not be allowed to testify as to private conversations with each other ; *provided*, that where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be permitted to testify in his own favor ; and where an executor or administrator is a party, the other party shall not be permitted to testify in his own favor, unless the contract in issue was originally made with a person who is living and competent to testify, except as to such acts and contracts as have been done or made since the probate of the will or the appointment of the administrator."

This § 14 was, in May 14, 1864, ch. 304, so amended "as that executors, administrators, guardians, trustees, assignees, and all other persons acting only in a representative capacity, who are parties to any civil action or proceeding, as therein defined, shall be competent witnesses for themselves or any other party, notwithstanding the death or insanity of one of the original parties to the contract or cause of action in issue."

And "if either party to a suit or proceeding shall

give his deposition in his own behalf and subsequently die or become insane, and such deposition shall be admissible and actually used in evidence at the trial after such decease or insanity occurs, the other party shall be admitted to testify."

And further the Massachusetts legislature, on May 9, 1865, ch. 207, enacted that "whenever the contract or cause of action in issue and on trial was made or transacted with an agent, the death or insanity of his principal shall not prevent any party to the suit or proceeding from being a witness in the case: provided, such agent shall be living and competent to testify."

Section 2. "Whenever the contract or cause of action in issue and on trial was made or transacted with the wife of any one of the parties, in the absence of her husband, she may be a witness for either party, although not joined in the suit; but she shall not be allowed to testify as to private conversations with her husband."

The foregoing provisions contain all of the enactments of Massachusetts at present in force in reference to parties and their admissibility as witnesses.

And if the State laws, which were formerly rules of decision for the Federal courts, have now become also rules of evidence in admiralty, as well as in equity and at common law; it would seem to be difficult to conceive, how any mode of judicial interpretation could well be devised, or adopted, to exclude parties from testifying in the admiralty courts, unless under and by virtue of the exceptions contained in these acts.

The exceptions are generally, the death of one of the original parties to a statement, agreement, or other transaction between them; or where one of the parties to a proceeding in law, equity, or admiralty, is an executor, administrator, or guardian.

By the State laws of Ohio, Georgia, Massachusetts, and other States, parties are admitted as witnesses competent, to a certain extent, to testify ; and, to the same extent, they are equally admissible in the Federal courts, notwithstanding they may be interested in the result of a trial. By the act of Congress of 1862, already referred to, this privilege or right would seem to be accorded and extended to parties in the Federal courts, whether the trial or matter in controversy be at common law, in equity, or in admiralty. The rule is clearly designed to be uniform in all these several tribunals, whether sitting as circuit or district courts. And the whole of all the recent legislation, by the national or State legislatures, was manifestly adopted for the obvious purpose of investing parties with a new legal character, under the modified rules of evidence. The design of all such legislation is clearly to augment, and not to abridge, the personal privileges of parties to suits ; and it would seem that every successive act of any legislature, is intended to be progressive and not retrogressive, in regard to the effect of interest upon competency to testify.

Formerly the rule was rigidly and inflexibly otherwise ; and whenever there appeared to be a legal interest in the result of a proceeding in admiralty, it operated as a disqualification ; rendering parties incompetent to testify, according to the well-known rule, so long prevalent and practised upon, in the common law courts.

But of late, this precise rule of evidence has become gradually relaxed, not only from necessity, but by an advanced legislation, and agreeably to a more liberal

and catholic administration of the principles of the maritime law as now interpreted.

At the present time, therefore, it may be assumed that all persons, in Massachusetts, may be admitted to be sworn and examined as competent witnesses in the admiralty courts, as freely as it would be practicable for them to be so sworn and examined in the State courts. If not excluded in the State courts, they certainly should not be in the Federal courts. And the only existing legal restrictions are to be found in the acts of the legislature of this State. The provisions of the General Statutes of Massachusetts, and the subsequent additional acts, have been already cited in the present chapter.

In addition to the State provisions and that of the United States of July 2, 1864, it may be necessary to refer to and cite the subsequent act of Congress passed March 3, 1865; whereby it was enacted that "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court."

On account of the recent date of these enactments, no special judicial construction has been called for, upon any of them, except that of March 3, 1865, just cited.

The particular expression, unless "required to testify thereto by the court," on the first impression, seemed to be intended to clothe the court with a species of discretionary authority, to summon to its aid, in a case of

doubt or difficulty, even a party, when not called by the opposite party, should such court deem it expedient so to do, in order to secure a just and fair administration of the law.

In admiralty cases, therefore, it has been assumed, that if suits are by or against executors, administrators, or guardians, and the evidence *aliunde* should be insufficient, and leave a judge in doubt as to the real legal merits of a transaction, it would be entirely competent for him, in the exercise of a sound discretion, to require the presence and aid of an original party, or any other party interested, for the purpose of removing that doubt, and solving the difficulty. Hence it has been broadly stated, that hardly any person is now legally excluded from being admitted as competent to testify in admiralty proceedings. Whether the same rule shall prevail in trials at common law and in equity, is a consideration somewhat foreign to the end and aim of the present treatise ; but if, in either case, a different rule should prevail there, it might materially affect the rules regulating all proceedings in admiralty also. Therefore, it seems fit to notice any construction, judicially given, and occurring since the preceding portion of this chapter was prepared for the press, which may, remotely or by analogy, have a bearing upon what have been stated to be the logical result and legal deductions, from the recent State and National legislation, as it may have affected the rules of evidence, concerning the competency of parties as witnesses.

Id certum est quod certum reddi potest, is a maxim as applicable to a contract, conveyance, or lease, as to a custom, award, or performance. And if, at any time, the circumstantial evidence be insufficient to enable a

court to render an incontestably correct decision, he may require the introduction of other direct testimony to make his conclusion irresistibly clear, and to satisfy his judicial conscience. If a court be so inclined, it may, under and by virtue of the concluding terms of the act of 1865, require a party to appear and testify in such a case. Such an act would be but an act of judicial discretion, honestly and fairly exercised; and, therefore, would be strictly compatible with the terms of the act, and entirely conformable to the intent and tenor of the recent legislation in regard to parties as witnesses.

A legislative act is to be interpreted according to the intention of the legislature, apparent on its face; and every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature. *Wilkinson v. Leland et al.*, 2 Pet. 662.

The intention of the legislature is to be extracted from the whole; 2 Cranch, 358, *United States v. Fisher et al.*, assignees; and the intention of the legislature, when discovered, must prevail; any rule of construction, declared by previous act, to the contrary notwithstanding. 3 Dallas, 365, *Brown v. Barry*.

Generally, statutes are to be construed to operate *in futuro*, unless a retrospective effect be clearly intended. 2 Gall, *Prince v. United States*.

Laws are construed strictly, to save a right or avoid a penalty; and liberally, to give a remedy or effect an object declared by the law. 1 Bald. 316, *Whitney et al. v. Emmett et al.*

The statute of 1865 is obviously remedial to a certain extent; and as such, should be so construed as to re-

move the evil and advance the remedy. The evil is, the exclusion of witnesses on the ground of interest; the remedy is, to remove the disqualification by admitting persons and parties to testify notwithstanding their interest in the result of a trial.

The object of the late legislation is plainly to admit parties liberally; and not to exclude, possibly, the best evidence, on the ground of interest solely. Whatever may be extracted from the whole, as the clear intention of the legislator, ought to be steadily adhered to and judicially followed.

The object of the legislation being to discontinue the ancient technical rules of evidence in reference to interest and competency of witnesses; it is plain, that the intention of the legislator, in these various enactments, is to accomplish this express object by a corresponding action, adopted to effect his purpose. That purpose, now become a policy, is to reform the law by liberalizing its technical rules. It is a progressive and not retrogressive career and course of policy, in this respect; upon which the State and National legislatures have entered. And if the terms of the enactments express duly the legislative intent, are suited to promote the adopted policy, and effectually accomplish the object and purpose of this enlightened and ameliorated legislation, no judicial construction should be interposed as an impediment. Certainly, there should not be any authentic restoration of the antiquated technical rule of evidence, the abrogation and discontinuance of which has been, of late years, the obvious aim, purpose, and intention of the various legislatures which have taken action upon this subject.

It could hardly be supposed that a judicial interpre-

tation would be adopted, which would produce confusion, by rendering nugatory the object and policy of recent legislation as to the competency of parties; or so restricting the power of the Federal courts, as to render that intended to be conferred upon them of no practical value to suitors, parties, or the public.

A first interpretation of a fresh legislative act, unless it be made with a view to promote and not to neutralize or nullify the object, purpose, and intention of the legislature, will tend directly to create the necessity for additional legislation. And if the intent of the legislature be manifestly misapprehended or misinterpreted, new and declaratory legislation will become an imperative necessity.

In the United States First Circuit, on November 14, 1868, the court declared an opinion, holding that a party could not be admitted as a competent witness to testify, upon the hearing of a bill in equity to enforce the specific performance of a contract for mutual wills, upon the ground that it was not, by the act of 1865, a matter discretionary with the court; or, if it were so, that it was a discretion to be governed by fixed rules; or, in other words, a legal discretion and not therefore it may be supposed a judicial discretion.

How far such decision will ultimately be sanctioned by the appellate court at Washington, would be to indulge in an unsatisfactory and possibly useless speculation. It would be mere speculation.

Should the decision be sustained, then a grave question might arise, whether it would equally affect trials in admiralty as in equity. Should it, however, be reversed, then no occasion will exist for modifying or qualifying the doctrine of the text already advanced.

The case to which reference is made, is that of *Hetty H. Robinson v. Thomas Mandell et al.*; and the complainant's evidence was ruled out as incompetent. The court adjudged, that, without her evidence, no sufficient proof had been produced to sustain the allegations of the complainant's bill. It does not, however, positively appear that, with such evidence, the proof would have been sufficient. But if, with her evidence admitted as competent, proof adequate to sustain the material allegations of the bill might have been furnished, then it would seem to constitute just the precise occasion contemplated for the exercise of a reasonable judicial discretion, in requiring, beside the other proofs offered, the additional and direct testimony of the party living, who alone might be cognizant of all the facts and statements.

A court ought not to be "left without proof," as Mr. Greenleaf says, if, by its own order, and its own discretion, the necessary proof can be supplied. To prevent a wrong, or secure a right, every instrumentality to such end should be supplemented, if consonant with the principles and policy of the law, and clearly within the legitimate judicial discretion of a court. For, it may well be supposed that, in a case of paramount necessity, when a failure of justice might otherwise occur, no court would decline, or hesitate to resort to, the exercise of its judicial discretion; and, to avert such failure, exhaust its every conceded judicial power.

The exercise of an undoubted discretionary power is ever optional with the court, as to the time or manner of such exercise. But whenever a court elects to resort to it, no artificial rules of practice or evidence can

restrain it in such election, or inhibit such exercise. If once clothed with such authority, it is imperative on a court not to lay it aside, but to use it. The contrary course would be a dereliction of official duty ; and a formal abnegation of admitted power might tend to the practical temporary suspension of some act of the legislature ; whereas the sustaining and enforcement of such acts, is the principal duty, and special province of a judge, in administering and declaring the law.

To reinstate, by judicial construction, therefore, those identical rules of evidence which it has been the obvious design and policy of the legislature to modify or abrogate, would seem to be a palpable irregularity. Any voluntary return, by the courts, to former rules, now abrogated or designed to be, would be in conflict with the existing legislation ; and so substitute judicial for congressional legislation.

CHAPTER XII.

PILOTAGE.

PILOTS are commissioned officers, and in that capacity are employed for either a general or special service. Their duties, as professional nautical experts, are many and various; such as taking charge of the helm of a ship; keeping her on her proper course; bringing her safely to anchor in the harbor; there, securely mooring or making her fast to the wharf.

If a pilot be employed for a voyage, then he may be deemed or designated a general pilot; but not necessarily serving under a commission or giving bond, as he may be shipped for that special service, as the able seamen, and other mariners are shipped for their respective grades and stations.

But if a pilot be taken on board at sea, or in the bay, merely for the purpose of conducting a single ship into a particular port or harbor, then he may be deemed and designated a special local or branch pilot. Such a pilot is empowered to act by virtue of a commission, issued to him by the local authorities, specifically defining his rights, duties, and privileges. By the express terms of his warrant or commission, he is ordinarily confined to his own pilotage ground, or designated district; and, generally, not permitted or allowed to encroach upon the territorial jurisdiction

or pilotage ground of another commissioned or branch pilot.

At the present time, the services of general pilots are in greater demand than they formerly were, in consequence of the increased number of ocean steamers, which employ such officers, to a limited extent, under special contracts.

There has been occasional discussion in Massachusetts as to the expediency and necessity of appointing by commission or warrant, general or bay pilots; and now by § 3, ch. 52, of the General Statutes, such discussion has permanently assumed the form of practical legislation.

But the legal questions which have been raised in the United States concerning pilotage are few; and affect chiefly the services rendered or tendered by the local pilots, on their own pilotage ground, and within their own particular districts. But in England, many such cases are to be found in the recent reports concerning compulsory pilotage, growing out of more modern English legislation.

In England, pilots are commissioned for the purpose of conducting vessels up and down the Thames, Medway, and other principal rivers, and in and out of Liverpool. Many legislative acts, since the 3 Geo. I., ch. 13, have been passed for the government and protection of pilots in their calling and profession; but the 6 Geo. IV., ch. 125, consolidated the laws regulating pilots and pilotage, and repealed the former statutes upon the subject. This last act, however, was amended by the 9 Geo. IV., ch. 86; and also by 3 & 4 Vict. ch. 68. At the present time, provision is made formally for what is termed compulsory pilotage; and the recent Admiralty Reports

contain several cases upon that subject. One of the latest is the case of the *Beta* (Br. & Lush. 328), which relates to a pilot's license. In the same reports another case may be found relating to compulsory pilotage, Br. & Lush. 199, *The Stettin*; also in Lush. 17, *The Temora*; *ibid.* 164, *The Earl of Auckland*; *ibid.* 202, *The Killarney*; S. C. *ibid.* 427; *ibid.* 268, *The Wesley*; *ibid.* 295, *The Annapolis*; Swab. 9, *The Gen. de Caen*; *ibid.* 69, *The Mobile*; 1 Spinks, 19, *The Hoedwig*; *ibid.* 106, *The Persia*.

There are other English cases of an older date, touching the employment, responsibility, remuneration of a professional pilot, and the master's control of his ship, when a pilot is in charge. Such are *The Nelson*, 6 Ch. Rob. 231; *The Bee*, 2 Dods. 498; *The Gen. Palmer*, 2 Hagg. 179; *The Enterprise*, *ibid.* 178 *n*; *The Christiana*, *ibid.* 188; and *The Ada*, *ibid.* 326; also *The Frederick*, 1 W. Rob. 17; *The Maria*, *ibid.* 110; *The Girolimo*, 3 Hagg. 177 *et seq.*, in which Sir John Nicholl reviews the previous British legislation and defines a master's duty; and *The Duke of Manchester*, 10 Jur. 865, and 2 W. Rob. 479, in which it was held to be a master's duty to look after a pilot, if drunk or otherwise incompetent, and not to blindly follow the orders of a pilot, unfit for duty or his station.

In the United States, prior to the adoption of the Constitution in 1789, States bordering on the Atlantic coast had enacted laws regulating pilots and pilotage. The power to regulate commerce, upon the ratification of the Constitution, was expressly vested in Congress; and that body would then seem to have exclusive jurisdiction over the whole subject of pilotage: but it wisely forbore to exercise such general jurisdiction; and in

fact so legislated, as to leave the existing State legislation to be applied, modified, or amended by the States themselves, thus delegating, voluntarily and formally, the power and jurisdiction of Congress to the legislatures of the several States, until otherwise provided.

Section 4, act of August 7, 1789, was the earliest Congressional legislation upon the subject and is as follows : —

“All pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or by such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress. 1 U. S. Sts. at Large, 54.

Although Congress did not totally divest itself of its rightful jurisdiction over this subject, nor delegate its power permanently to the States, but tacitly and impliedly reserved the right to resume its original jurisdiction, yet the rights and power of Congress remained in abeyance, for forty-eight years, before that body, as a legislature, saw fit to resume the exercise of its jurisdiction again, over the subject of pilotage. Accordingly, in 1837, March 2, Congress passed the following, as § 1 of the act of that date : —

“It shall and may be lawful for the master or commander of any vessel coming into, or going out of any port, situate upon waters which are the boundary between two States, to employ any pilot, duly licensed or authorized by the laws of either of the States, bounded on the said waters, to pilot said vessel to or from said port; any law, usage, or custom, to the contrary notwithstanding.” 5 U. S. Sts. at Large, § 1, p. 153.

Another respite or self-imposed abnegation, on the part of Congress, followed this enactment; and continued until 1866, when that body of legislators again, for the third time, exercised its legislative power over the subject of pilotage, and enacted as follows:—

“No regulations shall be adopted by any State, which shall make any discrimination, in the rate of pilotage, between vessels sailing between the ports of different States; or any discrimination against steam vessels or national vessels.” And all existing regulations or provisions, making any such discrimination, were annulled and abrogated. U. S. Act of July 13, 1866, 14th vol. Sts. at Large, p. 93.

Thus the United States Congress has pursued a course of legislation, under the Constitution, sedulously systematic; seemingly yielding to local convenience, but never permanently parting with any portion of its high prerogative as a national legislature.

While, on the one hand, it properly deferred to the more accurate and better knowledge of the citizens of a State as to its local wants and the exigencies of its peculiar shipping interest, commerce, and trade, foreign or coastwise; yet, on the other hand, this august body has steadily retained and periodically affirmed its own political and legislative powers and privileges. This policy was strikingly manifested,—

First, by the early authentic and voluntary act of Congress, in clothing the respective States with its own inherent and conceded power over pilots and pilotage.

Second, by continuing such transfer of its power to the States, for a period of nearly fifty years, without interruption; and then resuming and exercising its own right, only for the purpose of relieving masters from

compulsory pilotage, while in charge of their own vessels, and where they must have been competent to pilot themselves: and

Third, by reviving their suspended power, to abrogate existing unjust and unfair discriminations, as to the different descriptions and specific character of sea-going vessels; parting with its rightful authority originally for a temporary purpose; and then recalling it, at its pleasure, in case of necessity, in order to perpetually vindicate its peculiar province, privilege, or prerogative.

The whole system of pilotage is now substantially regulated by local State legislation; not exactly by a Trinity House Society or Corporation as in England; but by general acts, administered by the governor of a State or by commissioners appointed by him.

In the State of Massachusetts, for reasons of policy, the law generally has given, to the local licensed or branch pilots, the same fees for proffered services refused as for accepted services rendered. But, by the Revised Statutes of 1836, there was no provision that a pilot should have a lien on the vessel, to secure his pilotage fees, either in terms or by necessary implication; and therefore it was, that Judge Sprague, in 1855, when a Salem pilot libelled the R. J. Mercer for services tendered but not rendered, dismissed the pilot's libel with costs.

But in 1860 the General Statutes were passed; and this want of a lien by State law is supplied by § 7, ch. 52, which reads as follows:—

“Section 7. Every pilot shall have a lien for his pilotage fees, for the space of sixty days, upon the hull and appurtenances of any vessel liable to him therefor.”

In 1806, Judge Peters, in *Gardner et al. v. The Ship New Jersey* (1 Pet. Adm. 227) said: "Pilotage is a necessary expenditure on a voyage. As to pilotage, the master is bound, by the laws of Oleron, and other maritime laws, to pay it, for the safety of the ship and goods."

In 1805, Sir W. Scott, in the *Nelson* (6 Ch. Rob. 231), referring to an objection on the general exorbitancy of a pilotage demand, and the power of the court of admiralty to supersede such extortionate contracts, to which parties had been compelled to submit under a pressing necessity, then declared, "I admit that, by the ancient maritime law, the court of admiralty would have an equity to moderate contracts made under the pressure of necessity, arising out of the situation of a vessel at sea; and it might embrace cases of this description."

Pilots, however, may render extraordinary services, for which they should be duly remunerated. Thus, as has been elsewhere stated, a pilotage may be exalted into a salvage service. In the *Frederick*, (1 W. Rob. 17, the second of Dr. Lushington's reported decisions), it being a cause of salvage, that distinguished judge said, "It has been urged in argument for the owners, that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time, it is to be observed, that it is a settled doctrine of this court, that no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward. If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition, he would be subjected to no censure; and, if he did take charge of her,

he would be entitled to salvage remuneration." See also S. P. *The Pilorgis*, Bee, 212 ; *The Elvira*, Gilp. 60 ; *Hobart et al. v. Droган et al.*, 10 Pet. 108 ; *The Joseph Harvey*, 1 Ch. Rob. 306 ; *The Gen. Palmer*, 2 Hagg. 176 ; *The Brig Susan*, 1 Spr. 502 ; where Judge Sprague observes, "Pilots are not bound, unless by statute, to take the hazards or subject themselves to the labor of going on board such a vessel, for mere pilotage compensation.

"I hold with Dr. Lushington, that a signal made by a vessel in actual distress, and needing other assistance than pilotage, although it be the usual signal for a pilot, shall be deemed a signal for assistance."

As to the control of the master while a pilot is in charge of the vessel, further reference ought to be made to the useful note appended to the report of the case of the *Brig Susan* (1 Spr. 505) ; and, as to the responsibility of pilots, also to the very elaborate note at the end of the case of the *Julia M. Hallock*. Ibid. pp. 542-3 and 4.

All the State legislation, in behalf of pilots, is designed to encourage them, as a class, to devote themselves to their adopted and hazardous employment, and also to qualify and educate for the occupation enough of suitable persons to perform the duties requisite to secure the commerce and shipping of the State or district, from needless damage or danger. To this end, the acts adopted contemplate that the pilot shall not be interfered with, in his chosen pursuit, by competition ; but that, within his own district, his right shall be exclusive ; and there, at least, the pilot shall have and enjoy a monopoly of patronage and pilotage. This policy has proved to be salutary for all concerned ; ship-owners,

underwriters, merchants, mariners, and all persons who have property or life at risk upon the seas. Pilotage should be uniformly recoverable in the Federal courts, sitting in admiralty. It is otherwise in New York, or has been so. But in the *Steamship Co. v. Joliffe* (2 Wall. 450), the United States Supreme Court (1864) upheld the claim of a licensed pilot to half pilotage for services tendered but not accepted, though the State law, providing for it, had been subsequently repealed; the repeal not being deemed to affect either the claim, or a suit to enforce it.

As to the relative authority of the master and pilot, when the latter is on board, and in charge, it has been seen what the English court held, in the *Duke of Manchester*.¹ Several American cases may here be cited. *Reeves v. The Constitution*, Gilp. 579; *The Lotty, Olc.* 329; and *Smith v. The Creole*, 2 Wall. Jr. 485; from which it may be fairly deduced (qualifying somewhat a former portion of the text) that a pilot (though for the time being master) has not an authority paramount to that of the master, in securing the vessel in her berth; but the master, theoretically, is in full command, and the acts of the pilot are regarded as done with the master's direction and approval.

¹ Page 339, *ante*.

CHAPTER XIII.

RECOUPMENT.

SET-OFF at common law and recoupment in admiralty, though, as doctrines, they may be similar, are not precisely the same or equivalent as remedies. To a certain extent they resemble each other, and furnish to parties correspondent remedial protection. The one is the creation of statute legislation; the other is the product and legacy of the general maritime law and admiralty practice. Special legislation may render the remedy of set-off complete to a respondent; for by it he may not only recover, by way of defense, the whole amount of the claim for which any plaintiff may have sued, but also the excess, over and above such claim, if the proof clearly indicates it to be his due.

But in recoupment, no such beneficial result is practicable. There are two elements inherent in it as a remedy, rendering it, as such, imperfect and defective.

The first is, that if a respondent, in his defense, plead a recoup of damage for breach of contract, non-performance or other delinquency, and should succeed in establishing his right to damages greatly in excess of the claim for which the plaintiff or libellant may have promoted his suit, he will not be permitted to recover judgment for the excess.

The second is, that though he has proved clearly that

he is entitled to an excess of damage over the claim prosecuted, yet, having pleaded recoupment for that damage, in one suit, not adapted to secure him any of the excess, he is debarred from bringing a second suit, solely for the purpose of securing such excess, in a form and proceeding recognized as legitimate and appropriate.

These two peculiarities in the remedy by recoupment are indeed objectionable. But there are some compensations even for them, as will hereafter appear.

In the *Soblomsten* (1 Adm. & Eccl. 293), which was a suit concerning freight, Dr. Lushington recognizes the defense or process of recoupment as a legitimate remedy in admiralty touching freight, and uses the expression "recoup to freight."

There is no such doctrine as set-off, strictly speaking, recognized in the admiralty. Recoupment is only an approximation to set-off; in principle similar, in application less extensive. As a defensive allegation, if sustained by proof, it operates as evidence in the common law courts, and is sometimes introduced to justify a reduction or mitigation of damages. In this way, as a defense, it may be quite useful and convenient against the unjust claim of an irresponsible party; or against an alien friend or enemy, who is but temporarily within the proper jurisdiction; or to avoid duplicating suits; and thus the remedy by recoupment, though not so effectual for asserting and securing all equitable and legal claims for damages, and having other objections to it, which have been already stated, has much to recommend it in compensation for its remedial defectiveness.

The chief benefit to a party respondent in admiralty

is, that he is not necessarily driven to the remedy of a cross-libel, while this defense is open to him; and which, if duly alleged, would protect and secure him against, and to the extent of, the original claim for which a libellant may be promoting his suit. The claim for which suit is promoted, may be recouped to such extent, in order to make good another party's damage, loss, or deterioration of goods or property by the promonent's non-performance, non-delivery, breach of contract or negligence. *Pro tanto*, the original claim may be positively diminished, or it may be entirely extinguished. The damages, for which recoupment is an available remedy in admiralty, cannot exceed the original claim. If they do, then the excess can never be collected; for no decree can be made, and no second suit brought for that excess.

Should there be the chance of an excess of damage over the claim sued, and a fair prospect of securing it, after legal contestation, the skillful practitioner would advise his client to resort seasonably to his cross-libel, and not attempt, in the first suit, any defense by way of recoupment. *Spurr et al. v. Pearson*, 3 Mason, 109; *Willard et ux. v. Dorr's Admr.*, *ibid.* 161; *Snow et al. v. Carruth et al.*, 1 Spr. 224. In this last case, a libel was brought in the Massachusetts District Court to recover freight, which had accrued under a couple of bills of lading, for goods delivered to a consignee; and the defense relied upon was non-delivery, or, rather, short delivery, which, being alleged and proved on the part of the consignee, would recoup to him from freight the amount of his loss suffered by damage, non-delivery, or deterioration of the consigned goods, after shipment or receipt for them.

In behalf of the ship-owners, as carriers, it was insisted, that even if the consignee had sufficient legal interest to maintain a suit for damages, deterioration, or diminution, by reason of leakage, improper stowage, or negligence of any kind, still such damage could not be set up in defense in this process, and deduction adjudged in the shape of recoupment to freight. And Judge Sprague, in pronouncing judgment, said: "Considering the question on principle, there seems to be no reason for not allowing" this defense of recoupment.

In a contract of freight, the question is as to the *quantum*, if any damage be recoverable. Everything may be settled in one proceeding. The libel and answer are on the same contract, and the evidence the same, particularly as to delivery or short delivery, and whether the damage, deterioration, detention, or deduction be greater or less.

As there is no general doctrine of set-off recognized in the admiralty, the damages to be recouped cannot exceed the amount of freight claimed. It is optional for a party to resort to this defense as his remedy, or bring at once his cross-libel, if he expect or desire to recover damages exceeding the freight demanded. However the proceeding may be instituted, it raises a question of remedy, not of right.

In *Bearse v. Ropes et al.* (1 Spr. 331), a carrier sued for freight, which had accrued for the carriage of hemp, that was damaged, as the libellant contended, from dangers of the sea — and, therefore, was not liable for the damage — but, as the respondent contended, by the fault or negligence of the carrier. As the court was not satisfied that the damage was occasioned by the danger of the seas, within the true meaning of the bill

of lading, and as the amount of damage claimed exceeded the sum claimed as freight, the libel was dismissed with costs.

√ From what has been observed upon this subject, it will appear that, practically, recoupment is a mitigation, reduction, extinction, or deduction of damages claimed in an adversary suit; analogous to, but not identical with set-off in the common law courts. The latter is a full and complete remedy; the former but partial and incomplete; available, in defense, to secure and protect a party against possible loss; but not needed or useful, in prosecuting an ordinary right, inasmuch as the customary remedies are to be preferred. But as no statute has conferred on admiralty courts any jurisdiction over set-off, occasional resort to recoupment as a defense has been a necessity.

It is a convenient and just remedy, adapted to indemnify against equivocal claims, asserted by unscrupulous parties; summarily circumventing deep-laid or shallow schemes of sharp practice, and affording reasonable security to persons disinclined to litigation.

√ Most of the contested cases relate to the recovery of freight; some to the adjustment of demurrage. Of this latter description is the case of *Nichols v. Tremlett*, 1 Spr. 361. There, the parties brought cross-libels, and the discussion of the general doctrine by the court, furnishes a summary of the learning and perhaps a definition of the remedy, as well as of the doctrine upon which the remedy is founded.

The occasion for such discussion was a motion to stay further proceedings until a hearing could be had in a cross-libel by *Tremlett v. Nichols*. This libel, the court said, "is not merely defensive. It is not like a

cross-bill in equity, or a bill to enjoin a judgment, whose whole force is exhausted in repelling the claim of the other party. But it proceeds further, and claims damages upon an independent stipulation, and to a greater amount than may be decreed to the other party in the first libel.

"This claim the respondent did not present in answer to the former suit. It may be contended, that he might and ought to have set it up in defense of the first suit, and that he cannot now make it the ground of a new action. I think that he might have availed himself of it in his answer to the first suit, although this doctrine has been seriously doubted. The admiralty does not take cognizance of pleas in set-off, no statute having given it that authority, and it has been thought by some, that a distinct claim by the respondent, founded upon the violation of the contract by the libellant, is in the nature of a set-off, and so not cognizable by this court. But I am of opinion, that where the counter claim is founded upon the same charter-party, the respondent may set it up in his answer, so that the damages that he has sustained may be recouped from the amount which the libellant might recover.

"But in such case, if the damages sustained by the respondent should exceed the just claim of the libellant, the court can give no decree for such excess; the utmost effect being to diminish or extinguish the claim of the libellant. Nor could the respondent afterwards maintain a suit for such excess. He cannot be permitted to split up his demand, and litigate the same question twice."

Able and experienced counsel were engaged in this case, and the doctrines were, it may be supposed, thoroughly argued.

It seems plain then, that for demurrage suits, damages may be recouped ; in freight, damages by leakage, bad stowage, or other negligence may be recouped ; and a party may well elect to plead, in defense, recoupment, or bring a cross-libel to recover all possible damage.

CHAPTER XIV.

FREIGHT.

PROPERLY speaking, freight is the net product of a marine adventure ; or it is the rightful return to the merchant for the use of his vessel in conveying merchandise by sea to distant lands. But more generally still, freight may be defined to be a compensation for a safe maritime transportation and delivery of goods.

The shipment and carriage of cargo may be by the owner himself, exclusively in his own vessel, and upon his own account ; or by a charterer, who, under a charter party, hath leased the whole or a part of another's vessel ; or by a mere shipper, under a bill of lading of the master or owner, and who, thereupon, consigns his goods to the master on board, or to an agent abroad, for sales and returns.

But however the enterprise may be undertaken, and whatever its inception, mode, manner, or time of execution, the returns, at its termination, will be the profits, net proceeds, or freight arising or accruing from the voyage, charter, shipment, or other undertaking.

Freight may accrue in several ways :

1. To the ship-owner ;
2. From the charterer, under a charter party ;
3. From the shipper, under a bill of lading, or under a verbal agreement.

The owner may lade his own vessel entirely, taking the returns *in specie* and in *solido*. He then pays out insurance, outfit, and expenses of sailing and repairs; with these deductions, the net proceeds become to the owner his profits or freight. Of this description and character were the old East India and other voyages from the ancient commercial ports of New England, in the early part of the present century. In these expeditions, if shipments had been made, as in a general ship, the same lien on shipped goods would attach in favor of the general owner as do ordinarily attach in favor of a charterer.

When the owner sails and loads his own ship, none of the usual written instruments required by the usages of commerce or trade, need be resorted or referred to beyond the enrolled bill of sale. If, however, from choice or courtesy, the owner makes any exception, and sees fit to admit shipments by individual adventures, it should be by means of bills of lading, drawn up in the customary form, and containing the usual stipulations. A form will be found in Appendix (I.)

The charterer differs from the owner in this: that he may or may not have the possession and exclusive control of the chartered vessel. If he have a demise of the whole vessel, under and by virtue of his charter party, then the charterer is substituted for the owner, has exclusive control, and takes the situation *cum toto onere*. He is bound to bear all the burthens, and discharge all the duties thus cast upon him, as *quasi* owner. For all the purposes of manning, victualing, and repairing the ship, he is subrogated for the owner, by every rule and principle of maritime law, as well as of technical law, as administered in the common law courts.

But these liabilities and responsibilities, however, can only be devolved and imposed upon him by the written agreement, contract, or charter party of the owner, executed agreeably to the local law, and in conformity with the mercantile usages of the country.

Such contract, if it be a charter party, may be framed with or without restrictions. It may transfer to a charterer the entire possession of the vessel, or it may lease to him only a portion of the vessel, either for a limited time or for a specific voyage. If only a part of the vessel be chartered, then the legal document defining it, should precisely specify the aliquot part, number of feet, tons or other extent of space or place intended to be so reserved for a shipper's use, under a limited charter party or lease.

A shipper, without charter, usually makes his shipment in another's vessel, under and by virtue of a bill of lading, signed by the master as the agent of the owner. This instrument and its commercial value is pretty generally and well understood by the mercantile community; and has been equally well appreciated by courts and the legal profession, since the leading decision upon the subject in the case of *Lickbarrow v. Mason*.

By reference to Appendix (I.) it will be perceived that its preliminary and principal stipulations are, on the one hand, for a sound and staunch ship, expeditious carriage, and safe return; on the other hand, for the payment of a fixed freight or hire, on the vessel's arrival and completion of the voyage at the return port, or within a given number of days after commencing to discharge cargo.

In both of these documents, charter party and bill of

lading, stipulations differing from the ordinary provisions and consequently giving to those papers a peculiar and positive character, may be introduced, at the option of the parties. And if, by mutual agreement, such novel stipulations shall be imported, special care should be taken, not only that they be precisely and clearly stated, but that they shall conform to the commercial usages and local law of the country, and shall not be in derogation of the general principles of the maritime law. In the admiralty, novel and unusual stipulations in commercial documents are not much favored. By the courts they are looked upon with jealousy, and rigidly scrutinized; so that for mercantile men, their better practice would be to follow the Latin maxim, "*via trita, via tuta.*"

If merchants incline to enter into such unusual contracts, they must run the risk of prolonged litigation and be content with ultimate pecuniary loss. The usages of trade are well known in commercial States; and this knowledge is faithfully transmitted, from age to age, through the counting-room. Practically, these usages become part of the mercantile education of all those persons who are intended ultimately to engage in mercantile pursuits. They become incorporated into the law, and are judicially recognized and accepted as part and parcel of the law merchant of the world. All novel and unusual stipulations, in charter parties or other commercial instruments, should be measurably avoided, as an unsafe departure from custom, and imprudent in practice. To quit the beaten track is not only experimental but hazardous; and may result in disastrous speculation. Some have asserted that more fortunes have been made by luck than calculation.

Although there may have been exceptional cases of this description, yet it cannot be accepted as a general truth.

In sea adventures which require formal written or printed contracts, it is far better to adopt and adhere to the customary forms of such documents. These have been construed and sanctioned by the courts; and their construction is well known to the merchant, and cannot mislead. Unequal contracts, being essentially unfair, ought not to be judicially favored; and, generally, all attempts to overreach and take advantage, are likely to be expensive, at least, if not ruinous.

Shipments made in others' vessels, whether they be seeking, freighting, or general ships, ought commonly to be made in obedience to the well-known usages of trade and commerce, for the shipper's benefit.

If the goods be consigned, then the shipment, being made in the customary form, will facilitate and simplify the labors of a consignee; if put on board a chartered ship, then the rights, duties, and privileges of the charterer or others will be familiar to all parties interested; and if the shipment of a small adventure be made in a general ship, then the bill of lading made in the ordinary form, will best secure and protect the rights of both shipper and owner.

In commerce, usage is law; made so by the general consent of commercial men and States; and so recognized by all judicial tribunals, which take cognizance of maritime and mercantile matters. Therefore, to observe the mode of exchange, adhere to the course of trade and follow the customs of ancient commercial States is not only the safer, but the safest practice. *Via trita est tutissima etiam.*

Though charter parties and bills of lading are usually reduced to writing, or the ordinary printed forms of both instruments are adopted for use, yet a memorandum for heads of a charter party is sufficient to bind the parties, if duly proved to have been signed or assented to.

Even a charter party by parole has been repeatedly held to be valid in law in the State of Massachusetts. It was first so held by the Supreme Court of that State in 1820, in the case of Taggard et al. *v.* Loring, 16 Mass. 336; again in 1832, Thompson *v.* Hamilton, 12 Pick. 428; in 1835, Vinal *v.* Burrill, 16 *ibid.* 406; and in 1845, Muggridge *v.* Eveleth, 9 Met. 236. So also, a sale of a vessel by parole has been held valid in law. Bixby *v.* Franklin Ins. Co. 8 Pick. 86; Lamb *v.* Durant, 16 Mass. 336; and 4 Cranch, 48, United States *v.* Willing.

Under bills of lading and charter parties, the questions of earning and payment of freight have been considered and discussed; and numerous cases are to be found in the books, some of which will hereafter be cited, in which the freighter's liability for full or half freight, or freight *pro rata itineris*; otherwise *quantum meruit* has been judicially passed upon.

√ In a quite recent English authority, the right to *pro rata* freight was amply stated by Dr. Lushington; with a complete knowledge and review of all the former leading authorities. Delivery, notice, and acceptance are principal elements in such a discussion. And in the Soblomsten (1 Adm. & Eccl. Rep. 293), this learned magistrate is reported to have said substantially, that to sustain a claim for *pro rata* freight, there must be such a voluntary acceptance of the goods by their owner, at an intermediate port, as to raise a fair inference that

further carriage of the goods was dispensed with. No freight is payable, if the owner of the cargo is compelled, against his will, to take the cargo at an intermediate port.

Where a vessel is disabled at an intermediate port, the master is allowed a reasonable time to reship or tranship, so as to earn his freight.

The whole freight is payable if, by the default of the owner of the cargo, the master is prevented forwarding the cargo from an intermediate port to its destination.

To justify such claim, the acceptance by the owner of the goods must be voluntary; and so made, as to indicate that the further carriage was intentionally dispensed with.

These points are deemed to be settled by British law, and are so expressly stated to be by Judge Lushington in the case last referred to.

The earning and payment of freight is the primary object of all mercantile contracts made by parties stipulating for the marine transportation of goods. Whatever promotes this primary object is in pursuance of such contract; whatever tends to defeat or does absolutely defeat that object, may be viewed either as a breach of such contract or a misfortune. If caused by one party, the other will have, in some form, a claim against him for the contingent damage; if not occasioned by man's agency, or default, but by the act of God, violence of the winds and tempestuous weather, or public enemies, then the damage is attributable to perils of the sea; and the remedy, if any, would be against the underwriter and not the carrier.

And the obligation, in all contracts of affreightment, is mutual; for one party to pay and the other to earn

freight. Both parties, indeed, propose the earning of freight; if then, through the default of the freighter, none is earned, the ship-owner may recover compensation for such loss, and the damages would be according to the ascertained intention of the parties, and not according to what is reasonable; while the recognized measure of damages should be such as would be least burthensome to freight, and most profitable to the owner; subject, however, to those exceptions which are specified in the contract.

In all the varied discussions upon the subject of freight, many points have incidentally arisen; such as the character and description of freight earned, whether full or half, gross or partial, lump or *pro ratá*, freight; the nature of the contract and intention of the parties; perfect or incomplete performance; careless or safe carriage, in a tight, staunch, and strong, or unseaworthy vehicle; with good stowage and no leakage or the reverse; delivery in good order and condition or the reverse; with or without interruption, *vi majeure*, as the closing of ports, stress of weather, war, blockade, or capture or shipwreck; suspension, detention, delay, demurrage, or other retardment of the voyage; seeking and entering a port of refuge, without duly notifying the shipper, or asking for instructions or advice, as to the expediency of reshipping, transhipping, or selling the cargo, in order to make certain the completion of the voyage, as nearly as practicable.

With a view to this result, very much depends upon the fidelity and sound judgment of the master, who, in an emergency, is ever the representative of the ship-owner, as his constructive agent. Therefore, if a master is in fault and fails to do what is, on the whole, the best

for all concerned, the blame attaches to his employer or the ship-owner; and against him, accordingly, as a carrier, a right to corresponding damage would ensue to the freighter or shipper.

Notwithstanding all persons, as a generic term or definition, may be called freighters, who are liable to pay freight; still the expression, freighter or shipper, is purposely employed to designate the distinction that may subsist between those who hire and ship by charter parties, and such as hire and ship by bills of lading, or ship only small adventures, by parol contracts or informal agreement.

Sometimes attempts are made, by way of defence, to cast the liability upon an unauthorized agent, in order to exempt a principal from responsibility. The English cases were elaborately reviewed by C. J. Shaw in *Blanchard et al. v. Page et al.* (8 Gray, 293); that case contains a precise description and full discussion of the bill of lading, as affected by agency, express or implied; and after a partial review of the leading cases, that learned magistrate says: "The result is that the contract for carriage is between the shipper and ship-owner, and that an action for damages to the goods, on the non-delivery thereof, on the contract, must regularly be brought by the shipper; or if, in fact, he be acting as an agent for another person, not named in the bill of lading, then by such principal, on the contract made in his behalf; and that when an action is held to lie by any other persons for damage to the goods, it is through some derivative, incidental, or collateral promise or duty, and not on the original promise and undertaking for the safe carriage."

Many other American authorities will be cited.

Freight, like wages, is earned by performance ; and where there is no performance, no freight is due. *Howland v. The Ship Lavinia* (1801), 1 Pet. Adm. 123 ; *Simonds v. Union Ins. Co.* (1806), 1 Wash. 443 ; *Hurtin v. Same*, *ibid.* 530 ; *The Saratoga* (1814), 2 Gall. 164 ; *Sampayo v. Salter* (1816), 1 Mason, 43 ; *The Nathaniel Hooper* (1839), 3 Sum. 542. See also *The Frances* (1814), 8 Cr. 418 ; *The Société* (1815), 9 *ibid.* 209 ; *The Antonia Johanna* (1816), 1 Wheat. 159 ; *Arthur v. The Cassius* (1841), 2 Story, 81 ; *Miston v. Lord* (1848), 1 Bl. 354 ; *The Ann D. Richardson* (1849), Abb. 499, as to voyage broken up ; *Bork v. Norton* (1841), 2 M'Lean, 422, as to full freight ; *The Lively* (1812), 1 Gall. 315, as to illegal capture ; *The Fanny* (1824), 9 Wheat. 658, as to tortious possessor and innocent neutral carrier ; *Hodgeson v. Woodhouse* (1809), 1 Cr. 549, master is justified in retaining cargo until freight be paid, tendered, or payment be waived : *The Ann Green*, (1812), 1 Gall. 274, where it was held that captors are not, in general, entitled to freight, on the capture of neutral property on board of an enemy vessel, unless the goods be carried to their port of destination ; *Trask v. Duvall* (1821), 4 Wash. 181, where it was declared that an assignee of a consignee, under a bill of lading, was bound for freight before receiving the goods ; in *Columbian Ins. Co. v. Catlett* (1827), 12 Wheat. 383, that a ship-owner had a lien on the cargo, as between him and the owner of the cargo, for full or *pro ratâ* freight ; *Mason v. The Blaireau* (1804), 2 Cr. 240 ; *Palmer v. Gracie* (1821), 4 Wash. 110 (but this decision was reversed in *Palmer v. Gracie*, 8 Wheat. 605, and freight was defined to be a compensation for the carriage of goods ; meaning doubtless a safe carriage

and good delivery of the goods ; for a complete voyage and safe delivery exacts full freight) ; *The Commercen* (1 Wheat. 382), in which is affirmed that reported in 2 Gall. 261 ; *Case et al. v. The Baltimore Ins. Co.* (1813), 7 Cr. 358 ; *Kleine v. Catara* (1814), 2 Gall. 61 ; *Simmes v. Mer. Ins. Co., Alexandria* (1825), 2 Cr. 618 ; *Hammond v. Essex Ins. Co.* (1826), 4 Mason, 196 ; *The Henry* (1834), Bl. & H. 465, freight belongs to the real owner ; *Robinson v. Noble* (1834), 8 Pet. 181, barrels delivered less in number than those shipped ; *Harrison v. The Eclipse* (1838), Crabbe, 223, an agreement to carry free ; *Knox v. The Ninetta* (1844), *ibid.* 534, a violation of contract not a forfeiture of freight ; *Shaw v. Thompson* (1845), Olc. 145, notice given a consignee to pay master and not the charterer ; *Thatcher v. M'Culloch* (1846), Olc. 365, deviation not necessarily nullification ; *The Holden Borden* (1847), 1 Spr. 144 ; *ibid.* 17, *The Mary* ; *Weston v. Minot* (1847), 1 Wood. & M. 436, gross freight ; *Brittan v. Barnaby* (1858), 21 How. 527, all stipulations derogating from general rights should be put in writing ; 2 Spr. 1, *Hunnewell v. Taber* (1854), a case of asserted bad-stowage or leakage ; *ibid.* 19, *The Ship Zone* (1860), goods alleged to have been received in good condition, but delivered in bad order ; *ibid.* 28, *The Bark Cheshire* (1861), one shipper's goods damaged by those of another, the vessel is liable ; *ibid.* 31, *The Schooner Sarah* (1861) ; *ibid.* 33, *The Cargo of the Ship Anna Kimball* (1861), and S. C. 3 Wall. 37 ; 2 Spr. 35, *Pierce v. Winsor et al.* (1861).

Freight is not payable until there is a delivery of the goods at the port for which they are shipped. *The Livonia*, 1 Pet. Adm. 126. And if, by reason of any *vis major*, as stress of weather or other cause, a ship puts

into another port and unloads; or if she be wrecked and goods are saved, they must, at the expense of the ship-owner, be transhipped to the destined port, before freight is payable.

And freight *pro ratâ itineris peracti* is not due, unless the owner of the cargo voluntarily agrees to receive it at a place short of its ultimate destination. Case et al. v. Baltimore Ins. Co., 7 Cr. 358; The Hannah M. Johnson (1862), Bl. Prize Cases, 160; 858 Bales of Cotton, ibid. 325; where it was declared that, on general principles, property captured as prize belongs to the government, but *cum onere*. This condition *cum onere* appears to be irreconcilable with the doctrine held, in prior decisions, that no liens lay against the government; nevertheless, in one respect, certainly, in the United States, the equivalent of such a condition not only legally prevails, but is formally incorporated into the legislation of Congress.

By the act of March 2, 1867, in § 3 (Vol. 14, U. S. Sts. at Large, p. 567), it is substantially enacted that every collector of the customs, who shall be notified of freight due on goods in his custody, may refuse delivery thereof from the public warehouses, until he shall have been satisfied that the freight is paid or secured; such refusal to be without prejudice to the United States, or its officers; and if such goods shall be forfeited to the United States, then freight shall be paid from the proceeds of the sale, like other charges and expenses.

So then, in this case, freight is allowed and solemnly recognized to be secured, as a preferred claim, like other expenses, against the government itself, whether its officers shall have in custody goods *in specie* or the proceeds of a sale of such goods, on which freight is due.

It is undoubtedly novel and special legislation, originating from some well authenticated case of hardship ; but not based upon any general principle of legislation. It is, practically, creating a new species of lien, not formerly known to the general maritime law, and which could not have been called into activity, without express legislative enactment. This will be more apparent in the next or a future chapter, when the subject of maritime liens shall be more particularly considered.

It will be seen, on reference to the English cases upon freight, that if the freight claimed be for carriage of goods, then the ship-owner has a lien on the goods to secure payment of the freight ; but not so, if there has been a demise of the ship to a charterer, as it is plain that, in this latter case, the cargo is in the possession of the charterer. *Newberry v. Colvin*, 8 B. & Cr. 166.

What constitutes a demise of a ship is a question of intention ; and, if claimed under a charter party, is to be gathered from the whole instrument. *Maclachlan*, Mar. L. 307 *et seq.* *Tate v. Meek*, 8 Taunt. 208 ; *Christie v. Lewis*, 2 B. & B. 410 ; *Faith v. East India Co.*, 4 B. & Ald. 630.

The construction by courts of contracts for affreightment should be liberal, and made to conform to the real intention of the parties, the general usage of trade, and the particular trade to which such contracts relate. 4 East, 130, *Robertson v. French* ; 2 C. B. 412, *Same v. Jackson*. Although oral evidence is not admissible to vary or contradict such agreements, yet it is admitted for the purpose of explaining what the parties had left in doubt as a local usage of landing cargo at a particular wharf for the consignees' benefit. 9 Cl. & Fin.

557, *Shore v. Wilson* ; 29 L. J. 256, *McDonald v. Longbottom*.

The following cases may be profitably consulted as leading and latest authorities in English reports:— 5 E. & B. 419, *Mitcheson v. Oliver* ; 2 Camp. 517, *Frazer v. Marsh* ; 7 Taunt. 14, *Hutton v. Bragg* ; 10 Bing. 345, *Dean v. Hogg* ; 2 B. & Ald. 503, *Saville v. Champion* ; 1 M. & Gr. 502, *Belcher v. Capper* ; 1 H. & N. 183, *Tarrabochia v. Hickie* ; 3 B. & Ad. 514, *Pittegrew v. Pringle* ; 4 East, 477, *Hall v. Cazenove* ; 7 Ell. & Bl. 266, *Humphrey v. Dale* ; 3 Esp. 121, *Corkran v. Retburg* ; 1 M. & Wels. 475, *Hutton v. Warren* ; 7 T. R. 259, *Hadley v. Clerk* ; 4 Ell. & Bl. 979, *Reed v. Haskins* ; 6 Bing. 716, *Davis v. Garrett* ; 7 Exch. 734, *De Rothschild v. R. M. St. Packet* ; 5 B. & Ad. 65, *Goss v. Nugent* ; *ibid.* 742, *Rippinghall v. Lloyd* ; 6 Exch. 424, *Ellen v. Topp* ; 13 Jur. 639, *The Sir Henry Webb* ; *ibid.* 531, *The Lady Douglas* ; Swab. 310, *The Ringdove* ; *ibid.* 335, *The Newport* ; Lush. 57, *The Victor* ; *ibid.* 444, *The Leo* ; *ibid.* 578, *The Salacia* ; Br. & Lush. 377, *The Norway* ; and S. C. *ibid.* 404, in which the judicial committee of the Privy Council reversed the decision of the Admiralty Court.

The foregoing authorities, together with the cases commented upon by C. J. Shaw relating to bills of lading in 8 Pick. 293, *supra*, and the leading case of *Lickbarrow v. Mason*, on the same subject, comprise all the varied learning to be found in the reports. Text writers, and especially Maclachlan, will furnish further aid and instruction upon the subject. But whatever may be the controverted question, the learned practitioner cannot well perform his whole duty to the court or his client, without a familiar and precise knowledge of the

points and principles settled and established by the preceding authorities.

With a reference hereafter to the leading cases in the English Admiralty, the only remaining authentic sources to be consulted for instruction upon the earning and payment, loss or suspension, of freight, are the foreign codes. But these, at the present period, are not entirely conclusive as authority. So much have they been qualified by modern legislation, and recent decisions, that it would be quite unsafe to rely upon them implicitly as general or accepted doctrine for the settlement of maritime causes, without some caution.

In the French Ordinance, book 3, title 1 relates to charter parties and freighting of ships; title 2, to bills of lading; and title 3, treats of freight; comprising twenty-eight different articles in this one title; and referring in brief to the chief topics which have entered into the many discussions and decisions of modern times. The more this ordinance is examined, the more will all students incline to join Charles Abbott in designating it as "the maritime code of a great commercial nation, which has attributed much of its national prosperity to that code; a code composed in the reign of a politic prince; under the auspices of a wise and enlightened minister; by laborious and learned persons, who selected the most valuable principles of all the maritime laws then existing; and which in matter, method, and style, is one of the most finished acts of legislation that ever was promulgated."

This 3d title, upon freight, is mainly intended to give a synopsis of whatever was valuable and important in 1681 to secure the respective rights of masters, merchants or shippers and ship-owners. It provides gener-

ally, for the regulation of freight by charter party and bill of lading :

For restraining a ship-master from taking on board more cargo than that supplied by the freighter, without the latter's consent ; or without allowing him freight therefor :

For compelling a merchant to pay full freight, if he load less ; and *extra* freight, if he load more than the quantity stipulated for :

For awarding damages, if a master overstate the capacity of his vessel, unless the difference stated should be inside of one fortieth part :

For paying one half freight, should the shipper re-land his goods before the vessel shall have sailed on her voyage :

For authorizing a master to unload and land any goods, put on board without his knowledge, or to exact for such goods the highest rate of freight :

For exacting full freight of a shipper, who may unload his goods during the voyage, unless compelled so to do by the master's act :

For securing to the master full freight, for carriage ; and also damages of retardment (demurrage), should the freighter either detain or force the ship to return empty ; and, on the other hand, damage to the freighter should the vessel be detained by the master's default :

For requiring a freighter to wait for refitment, if the carrier vessel be disabled, or pay full freight ; and the master to hire another ship, if his own ship be not in a condition to be refitted ; but if he be unable to do this, then he shall be entitled only to freight, *pro ratâ itineris peracti* :

For exacting forfeiture of freight of the carrier and

allowing damages to the shipper, should a vessel put to sea in an unseaworthy state :

For paying freight out of the contribution for goods jettisoned ; also for cargo sold to refit the ship or furnish necessary supplies ; but outward freight only shall be paid, when commerce has been interdicted, even though the vessel shall have been freighted to go and come :

For remitting freight which would have been earned by a ship, arrested by a superior power during the time of her detention, if freighted by the month ; and if hired by the voyage, there shall be no augmentation of freight ; but seamen's wages and food shall be deemed average for the time of detention :

For empowering a master to sell a portion of the cargo to pay freight, and warehouse the residue, should a consignee refuse to accept :

For restoring freight advanced, in case of goods lost by wreck, pirates, or public enemies, unless otherwise stipulated :

For requiring payment of freight due to the place where the goods were taken, if the ship and goods be ransomed ; and the master to contribute toward the ransom ; such ransom to be based upon the current price at the place of discharge :

For allowing to the master freight of goods saved from wreck, should he transport them to the place of destination ; but unless he find a ship to transport, he shall be entitled only to proportional freight :

For inhibiting the master from detaining goods in his ship, for payment of freight ; but, when unloading, it is permissible for him to stop the goods from being carried away, or to seize them in the lighters :

For creating a preference, lien, or pledge in the master's favor, for the freight on goods while in his ship, or lighters, or on the wharf; and continuing to him such hypothec for fifteen days after delivery, unless the goods shall have passed to the possession of a third party:

For prohibiting a merchant from compelling a master to receive for freight goods fallen in price, or spoiled, or damaged by their own fault, or by accident; provided however, if wine, oil, honey, or other liquors, in casks, shall have so leaked that the casks are nearly or quite empty, the merchant may abandon the casks to the master for freight:

For prohibiting brokers and others from improperly getting more freight than the contract stipulates for, under a penalty of one hundred livres or further punishment if deserved:

And for allowing a freighter, who has not filled the whole ship, to take other goods, and appropriate the additional freight for their carriage to his own use.

Some of the articles of this ordinance are modified and qualified by modern decisions and legislation; but, the substance of many of them form part and parcel of the general maritime law, and are deeply incorporated into the decisions of both the common law and admiralty courts of England and the United States.

✓ At the present period, it is established law, that when a ship is disabled by stress of weather or other *vi majore* so as to require repairs, and in consequence of such disability, is compelled to seek a port of refuge for repairs and refitting; and the intermediate port is so remote from the port either of departure or destination, that communication with the shipper or merchant is measurably impracticable; and the preservation of the cargo,

from its condition or nature, requires removal or transhipping; it then becomes the duty of a master to hire, charter, or otherwise procure another ship, to securely forward such cargo to its place of destination, or reship it to the freighter, in order to entitle himself or his ship to freight, either full or *pro rata*.

And this duty, thus devolving upon the master, as the agent of all concerned, is so imperative, that any omission to perform it would subject the master, as agent, or the owner, as principal, to suit for damage. It is not merely an authority with which a master, by his appointment, is constructively clothed; but a positive duty cast upon him, *ex virtute officii*, by the general maritime law, as now interpreted and administered in the admiralty courts of England and this country. And in order to earn and secure freight, a master must observe and perform this duty, unless prevented by some superior force or invincible necessity.

The foreign codes and jurists have conflicted *inter sese* somewhat in this respect; the codes not containing the same expressions, and the jurists not construing those expressions in precisely the same manner. Thus as to this very right or duty of a master to reship or tranship, the articles in the codes differ, and the constructions of eminent French jurists disagree.

Such differences are permanent with those jurists who have been text writers; and to whose recorded opinions access may be had through their published works. But the damage resulting therefrom is not probably so great as the differences are permanent. For these differences, in the codes and constructions, have been subjected many years to the critical test of legal discussion and judicial examination; and the re-

sult is, that the better and prevailing doctrine is now in harmony with that of the French Ordinance, and the opinion of Emerigon upon this subject.

The laws of Oleron and Wisbuy seem to invest the master with power, but do not expressly impose upon him the duty of exerting that power. By these codes, the duty is not imperative; but they left it optional with the master, to hire a ship for forwarding or transshipping, or not, at his discretion.

But the ordinance of Louis XIV. was more pronounced in its directions; and prescribes the duty positively and precisely.

So much of the laws of Oleron, as relates to this subject, may be found in article 4, *Jugemens d'Oleron*, and reads substantially as follows: If the master can promptly repair or refit his own ship, he may do so; or, if he chooses, he may freight another to complete the voyage.

So much of the laws of Wisbuy as relates to this subject, is contained in article 16; and may be read substantially thus: The master may fit out his own ship, if he can seasonably do so, to complete the voyage; if not, he may transfer the cargo to another ship destined for the same port to which he was bound, paying freight therefor.

The French Ordinance (art. 11, tit. 3, book 3), contains its direction as to transshipping and proportional freight, and reads thus: "Si le maître est contraint de faire radoubier son vaisseau pendant le voyage, le chargeur sera tenu d'attendre, ou de payer le fret entier; et, en cas que le vaisseau ne puisse être raccommodé, le maître sera obligé d'en louer incessamment un autre; et s'il n'en peut trouver, il sera seulement payé de son fret à proportion de ce que le voyage sera avancé."¹

¹ "If the master be compelled to recaulk his ship during the voyage, the

It will be perceived that by the laws of Oleron and Wisbuy the power to tranship is conferred upon the master, without any obligation to exert it; but, by the French Ordinance, he not only has conferred upon him that power, but it is made his duty to exert it. If then, a master has such power, at any intermediate port, he ought, as a faithful agent and steward for ship-owner and shipper, promptly to reship and tranship, if practicable, to the destined port; personally overlooking and superintending the transfer and stowage of cargo, in order that it may proceed in good condition and order.

This is a master's duty according to the more modern doctrine; and is so recognized substantially in the admiralty courts of England and the United States. This doctrine results, as a necessary logical sequence, from the position and appointment of the master; is duly derived from principles prescribed by the more ancient commercial nations, and is founded in solid reason, as well as sustained by high authority.

Nevertheless, eminent foreign jurists have widely differed with each other, in their comments upon and construction of some portions of the Ordinance. Mr. Kent (3 Com. 269) represents Valin and Pothier as totally at variance with Emerigon in reference to the master's duty to substitute another vessel (*louer incessamment un autre*) in order to tranship and transport the cargo onward to its destination, or to the freighter. For thus forwarding, in good condition, goods which

freighter must wait or pay full freight; and in case the ship cannot be repaired, the master is bound instantly to engage another; but if another cannot be found, then he shall only be paid freight in proportion to so much of the voyage as he shall have performed."

might otherwise deteriorate or perish, the master may entitle himself, ship, or owner to freight; whereas, by not so sending forward the cargo, the freight due might be lost. The reference by Mr. Kent to Emerigon is to that part of his commentary on another article of the Ordinance than the article cited in this chapter; and therefore may be deemed by the student worthy of re-examination.

The discussion in Emerigon more particularly relates to art. 7, in title 1, book 3, "*des charte-parties*"; and also to art. 15, in title 3, "*du fret ou nolis*." In the 428th page of Emerigon, he says: "If there happens interdiction of commerce *with another country* than that for which the vessel is destined, says art. 7, the charter-party shall *subsist entire*. And Pothier (tom. 2, page 403): 'The occurrence of a war does not discharge the parties from their respective obligations.' So Valin: 'The captain cannot claim any augmentation of freight.' Nevertheless, an arrêt of the council of 20th May, 1744, in the case of vessels fitted out for the cod-fishery on the Banks of Newfoundland, not being able to proceed on their voyage, in consequence of a declaration of war against England, fully released and discharged the owners, captains, seamen, and others, from all their obligations on both sides. At this time there was no interdiction of commerce with the places of destination of our French fishing vessels. Nor was it one of the cases specially provided for by the Ordinance. Apparent danger is not a reason with the Ordinance for annulling the contract. War is in the place of rocks and storms. I think then, that this arrêt, dictated by a spirit of equity, and by reasons of state, is not to be drawn into a precedent, nor still less considered as a general law."

This may be a very just reply by Emerigon to Valin and Pothier, but it is hardly a commentary upon the cited article 11th, wherein it is supposed that the duty to tranship is absolutely imposed upon the master of a disabled ship.

To whatever article, however, these differences among the French jurists may really apply, it is satisfactory to know that they have not been unattended with benefit to jurisprudence and the cause of sound learning and just interpretation; for the conflict of minds, well matched, cannot fail to elicit and elucidate simple or complex truths.

Although Valin may have advanced one opinion, Pothier held to another, and both come in contact and conflict with Emerigon, still that disagreement among them has ceased to be, at the present time, embarrassing either to courts or counsel; the law in this behalf having become, by lapse of time, gradually and firmly established; and its professors and administrators having wisely embraced and adopted the early, but better opinion and interpretation of Emerigon.

When, therefore, by any disability, a ship is incapable of proceeding upon and completing her voyage, it is the master's duty to forward cargo by another ship procured by him for the purpose; as it would be a breach or dereliction of duty for him to omit so to do. And this is the doctrine to which Emerigon early gave his adhesion, and from which Valin and Pothier are said to have early dissented.

The master who is driven into an intermediate port by stress of weather, with his vessel unable to proceed, is bound to repair his vessel in convenient time, or procure another vessel to convey the goods on toward their destination. 2 McLean, 422, *supra*.

And if a ship be unable to reach her port of destination, and the owner of the cargo shall receive it at an intermediate port, freight *pro ratâ itineris* is recoverable. And where the owner of the cargo is the cause why it is not transported to the port designated, full freight may be demanded.

But a permanent embargo would excuse a master from the performance of his contract. If the obstruction be temporary, it suspends it. *Ibid.*

Where a voyage is broken up, after its commencement, by an interdiction of commerce with the port of destination, or by accident, or by superior force, no freight is payable. Yet if, at an intermediate port, there be a voluntary acceptance of the cargo, freight *pro ratâ* is due. *The Saratoga, supra.*

If the cargo shipped is not carried to its place of destination, no freight can be demanded. If voluntarily accepted by the owner or his agent, at any other port, freight *pro ratâ* is due ; but if it be received by compulsion, and the master or factor, acting for the benefit of all concerned, shall receive the proceeds thereof, freight is neither earned nor due. *Hurtin v. Union Insurance Co.*, 1 Nash. 530.

It seems, also, that a shipper has a right, by the maritime law, to examine the goods, after unlivery, in order to ascertain whether they are damaged or not, before he makes himself liable, at all events, for the freight.

A lien on the cargo for freight is recognized by the common law, and maritime law ; but it may be displaced by particular circumstances, which denote a clear and determinate abandonment. *Ibid.*

And it seems that where freight is paid in advance, and the voyage is not performed, the ship-owner cannot,

without an express stipulation to this effect, retain it, but the shipper may recover it back. *Pitman v. Hooper*, 3 Sum. 50.

A neutral ship, engaged in transporting provisions for the use of the army of a belligerent, which army is in a neutral country, and engaged in a distinct war with a third belligerent, is not entitled to freight. *The Commercen*, 2 Gall. 261.

Where a vessel has been captured on her voyage, and condemned at an intermediate port, and a part of her cargo has been restored, and sold at the same port, no freight is due for the cargo so restored. *Sampayo v. Salter*, *supra*.

Freight *pro rata* can only be demanded upon the ground that there has been a voluntary receipt of the goods at an intermediate port. Captors are not generally entitled to freight, on the capture of neutral property on board of an enemy's ship; unless the goods are carried to the port of destination with the intent of the contracting parties. But, if the property, or the proceeds of it, be ultimately destined to the place where the captors carry the ship, freight is due to the captors. *The Ship Ann Green* and cargo, *supra*.

A neutral carrier of enemy goods is entitled to freight. But if he be guilty of fraudulent or unneutral conduct, or has interposed himself to assist the enemy, in carrying on the war, he will thereby forfeit all title to freight. 1 Wheat. 382; 2 Gall. 387, *supra*.

To this qualification of the general rule, may be added several others: such as, the carrying of contraband goods to the enemy; the engaging in the colonial or coasting trade of an enemy; the spoliation of papers;

and the fraudulent suppression of enemy interests ; any of which may work a forfeiture of freight.

So a neutral vessel, laden with a cargo of provisions, exported from the enemy's country, with the avowed purpose of supplying the army of the enemy, although destined to a neutral port, is not entitled to freight from the captor; and it is immaterial, that the enemy is carrying on a distant war; and that the provisions were intended for the supply of his troops in that war; and that the neutral was a subject of one of the allies of that war.

If the interdiction of commerce be with another country than that of the ship's destination, or after her departure, the case is not within the purview of the French Ordinance; and Emerigon is of opinion that insurances "are not in any way altered by such interdiction." Page 428.

Sometimes the stipulation for freight is for a gross sum for the round voyage out and home. In the *Mary* (1 Spr. 17), Judge Sprague held, that in such case, as the principal object of the voyage was to obtain a return cargo, and a general average had occurred on the outward passage, the whole freight for the round voyage should contribute.

As to a question of freight upon a transshipping of prize goods, between the ship and cargo and the transshippers, reference may be had to the *Copenhagen*, (1 Ch. Rob. 289); for the allowance or recovery of freight. in case a voyage be not completely performed, to the *Emanuel*, (ibid. 296); the *Rebecca*, (2 ibid. 101 n.); the *Atlas*, (3 ibid. 304 n.); the *Allegoria*, (4 ibid. 202 n.); the *Ebenezer*, (6 ibid. 256); the *Friends*, (Edw. 246); and the *Commercen*, and the *Ann Green* (*supra*).

Where a demand for freight was made by a ship under embargo against a cargo not under the embargo, but which had been unloaded to be otherwise forwarded, Sir W. Scott thought the cargo not liable to the demand; for the cargo, having been brought out of its course, detained on account of the ship, and finally compelled to procure other conveyance to its market, should not be subjected to a payment of freight. *The Werldsborgaren*, 4 Ch. Rob. 17; and *The Isabella Jacobina*, *ibid.* 77.

After capture, restitution, unlivery and actual separation of carrier ship and cargo, such separation becomes legal by the act of unlivery, if authorized by a court, and dissolves the original contract, which cannot be revived by the demand of the owner of the cargo to reload and proceed. *The Hoffnung, Rask*, 6 Ch. Rob. 232.

By capture, the captor succeeds to the rights of both ship and cargo. If he then, after a decree of restitution, shall invoke the authority of a court, take out a commission for unlivery and unload, the contract is thereby dissolved; the vessel may proceed at once without reloading; and, although detained for a while after, such temporary detention will not revive the contract.

✓ Generally, bills of lading are transferable by indorsement, subject to stoppage *in transitu* in case of bankruptcy, if that might be seasonably and properly asserted.

In *Saunders v. Vanzeller*, 4 Ad. & El. (N. R.) 260, a ship-owner brought suit against an indorsee of a bill of lading, who had demanded and received the goods under and by virtue of such bill of lading; and it was

decided "that the action against the indorsee of the bill of lading who had accepted and taken the goods, without payment of freight, would not lie; not on the original contract, because the defendants were not parties to it; not on an implied contract, because the law raised no promise, by implication, against a consignee or indorsee of the bill of lading;" thus making it to turn, as was said, "on a legal distinction, narrow but well defined, between a fact, from which the law implies a promise; and evidence tending to prove a fact, from which, when proved to the satisfaction of a jury, a promise is implied by law."

C. J. Abbott said: "A transfer of the property is, however, very different from a transfer of the contract."

And C. J. Shaw, in 8 Gray, 298, *supra*, said: "In law, the original contract of the carrier with the ship-owner, is like any other right or chose in action; it may convey an equitable interest but cannot transfer the legal right of action."

In Abbott on Shipping, p. 337, is this text: "In the case of an express contract, evidenced by a bill of lading, the action may be brought by the shipper with whom the master contracted, or by the owner of the goods, whose agent the shipper was.

In 1857, *Blanchard et al. v. Page* (8 Pick. 281), the judicial examination of the authorities and doctrines applicable to bills of lading, by the court, was quite elaborate and thorough, as to the right of the parties named therein; and C. J. Shaw stated the conclusion, to which the court arrived, to be this: that a carrier may be sued by a shipper named in a bill of lading, even though the shipper had neither a general, nor a special property in such bill of lading.

Besides referring to the cases of *Lickbarrow v. Mason*, and *Saunders v. Vanzeller* (*supra*), reference was also made to the cases of *Cock v. Taylor*, 13 East, 399; *Moore v. Wilson*, 1 T. R. 659; *Roberts v. Holt*, 2 Show. 443; *Strong v. Hart*, 6 B. & C. 160; *Domett v. Beckford*, 5 B. & Ald. 521; *Sargent v. Morris*, 3 *ibid.* 277; and *Joseph v. Knox*, 3 Camp. 320. The discussion and objections turned chiefly upon agency, on the relative position of agent and principal, or legal relation of consignor and consignee; yet the conclusion which the court reached, as declared by C. J. Shaw, was, that the original shippers and consignors in the bill of lading, by force of the original contract for safe carriage, might maintain an action against the ship-owners, for damage to the shippers' goods; and the ship-owner cannot prevent the shipper from recovering such damage, as may be the direct and natural consequence of a breach of the contract.

I am not aware that any of the more recent judicial decisions in admiralty do, in any way, conflict with the common law decision by the Supreme Court of Massachusetts. In 2 Spr. 51, *Swett v. Black*, Judge Sprague entirely assents to and adopts that exposition of the law; and certainly the admiralty decisions, reported in *Browning and Lushington for 1863-4*, to wit: the *St. Cloud* (p. 4); the *Tigress* (*ibid.* 45); the *Cargo ex Galam* (*ibid.* 167); the *Norway* (*ibid.* 266, 377, and 404); and the *Helene* (*ibid.* 415), are all substantially in harmony, and it may be taken to be settled, that, when a consignee interposes no objection, the consignor is entitled by law to sue the ship-owner for damage.

But a grave question may arise, how far it would be competent for a mere assignee, or consignee even, to

institute legal proceedings for damage, he not having any right of property, when any of the usual and well-known objections are to be urged as defense in suits for freight, and deduction is to be claimed either for non-delivery, short delivery, bad delivery, leakage, breakage, imperfect stowage, or detention, whereby the loss of the chance of a good market follows, from the default of the carrier or his agent or servants.

In the case of the *St. Cloud* (*supra*) it was held, that a bare assignee, without any property in the goods, or right thereto, was not deemed to be sufficiently a *persona standi in judicio* to promote suit,—such assignee not having the legal capacity or ability to sue as a party.

In this case, the right of stoppage *in transitu* was amply considered and discussed. In the *Tigress* (*supra*), Dr. Lushington, February 17, 1863, while examining the right of a master to refuse delivery to parties having the right to demand, states the rule applicable thereto; and justifies him in refusing to deliver, when he is “simply retaining the custody of (cargo) for the person entitled, until it should appear who that person was. An abundance of cases show, that the right to stop *in transitu* means the right, not only to countermand delivery to the vendee, but to order delivery to the vendor.

“Were it otherwise, the right to stop would be useless, and trade would be impeded.”

The legal description and use of a bill of lading are well understood. It may be described to be a ship-master's acknowledgment for goods shipped. As a commercial instrument, it, in one respect, resembles a bill of exchange; being negotiable, or rather transferable

by endorsement. The contract itself may be thus transferred ; but it does not thence follow that the property also is thereby transferred. And there is high authority for declaring that, although a bill of lading may be transferred to an indorsee, a transfer of the contract may be very different from a transfer of the property. An indorsee cannot establish a claim without proof that the indorser has in fact paid value for the goods. Nor can the right to stop goods *in transitu* be assigned to another ; for such right is a personal right of the vendor, of which he cannot be divested by any act of third parties.

The bill of lading, charter party, or their equivalents, are the customary legal instruments, in which the contract for freight is incorporated. The contract itself is termed affreightment, and its specific product is freight.

It has been not uncommon to consider these various subjects in distinct chapters. But it was supposed, that all which was necessary to be stated in reference to either charter party, bill of lading, or other similar written or oral agreements, which are permitted to be substituted for them, together with freight and affreightment, might well be included in a single chapter. Accordingly, the attempt has been made to accomplish that design ; and if the effort has been measurably successful, it has been shown that the parties engaged in contracts for freight, are, on the one hand, the ship-owner, master and charterer ; on the other, the merchant, freighter, owner of cargo, consignees, and assignees of bills of lading, or others succeeding to their legal rights.

From the authorities cited and statements made, it is manifest that the carrier will be entitled to payment of

freight, if it shall have been earned either by the actual or substantial performance of the contract; and that, for safe carriage, the freighter, shipper, or owner of cargo will be liable for the payment of the freight agreed for.

Transportation, as stipulated for by the contract, entitles the carrier to the freight, as stipulated for. By this is meant full freight, without any deduction by way of recoupment or otherwise, as contradistinguished from *pro ratá* or reduced freight. In other words, full freight is due upon complete performance; reduced freight, upon partial performance.

Partial performance may occur when the ship stops short of her destination; or when the voyage is interrupted by war, wreck, embargo, or other interdiction of commerce.

Substantial performance may be equivalent to complete performance, when the fault is not that of the carrier, or when the fault, if any, is attributable to the shipper or owner of the cargo.

Other superadded duties devolve upon the master, when he is compelled to seek a port of refuge for repairs:

First, the duty of refitting, if that shall be practicable;

Second, if refitment be impracticable, then the duty of forwarding by reshipment or transhipment.

But, for the purposes of freight, from both of the preceding duties the master is relieved, should the freighter, or his agent for him, voluntarily accept delivery short of the destined port, at some intermediate port of refuge; should the freighter, however, decline to accede to the delivery of cargo at any port short of its

destination, whereby the duty would devolve upon the master to refit or reſhip, at his election, and refitting be not deemed feasible, then for the ſpecial purpoſe of re-ſhipping or tranſhipping, the maſter is entitled to reaſonable time.

Interruption of a voyage may be cauſed by deviation, as well as by war or wreck. Deviation may be blamable or commendable. The carrier, in any diverſion from his direct courſe, muſt not be in fault. Should he cauſeſſy deviate, it would be blamable deviation, drawing after it forfeiture or deduction of freight, which are the legal penalties uſually attaching to unjuſtifiable departure from the regular route.

An involuntary deviation, occaſioned by ſtreſs of weather, purſuit of public enemies or pirates, would not be deemed blamable in the carrier; nor would a voluntary deviation, made for the purpoſe of affording relief to perſons in diſtreſs, ſubject a carrier to blame or censure; but, on the contrary, it muſt be regarded as a commendable act, and the maſter would be juſtified on the ground of humanity. *The Boſton*, 1 Sum. 328; *The Henry Ewbank*, *ibid.* 400; *The Blaireau* and *Brig Cora*, *ſupra*.

In any caſe of part-performance, non-performance, culpable deviation, neglect, and delay in refitting or re-ſhipping, where reduction or deduction may be claimed to be recouped in the ſame ſuit or recovered in another by cross-libel, a neceſſity for computation occurs, requiring clerical or auditing ſkill and ſervice, which, in England, are uſually effected by reference to the regiſtrar and merchants; but which, in the United States, may be done by ſending the matter to an aſſeſſor, auditor, or referee.

By the policy of the law, freight does not become due until the voyage has been performed. Nevertheless, it is competent for a party to make an absolute payment in advance, and which will not, therefore, depend upon the performance of the voyage. If this payment be made in anticipation for taking goods on board merely, it cannot, strictly speaking, be deemed freight, as freight is the compensation to be made for the transportation of cargo to its place of destination, and so denotes the price of the carriage and not that of the reception of goods to be carried. Abb. Sh. 406, Smith's Merc. L. 283.

A right to freight may vest and become a charge upon the cargo, where a vessel has been captured and restored. The *Hoffnung*, *supra*.

The completion of the contract of affreightment may be prevented by the fault or incapacity of the ship, or cargo, or both. The *Copenhagen*, 1 Ch. Rob. 289; The *Louisa*, 1 Dod. 319; The *Fortuna*, Edw. 57; The *Prosper and Holstein*, *ibid.* 72; The *Race-horse*, 3 Ch. Rob. 101.

So also it may be prevented by capture. The maxim that capture is delivery and therefore freight is earned, is true only where the captor succeeds fully to the rights of the enemy, and represents him as to those rights.

The captor of a neutral vessel, having enemy's goods, pays the whole freight, though it has been earned by the completion of the voyage, because he represents the enemy by possessing himself of the enemy's goods *jure belli*. The *Copenhagen*, *supra*.

Temporary incapacity to perform, or involuntary disability to deliver, is not then necessarily fatal to the recovery of freight.

As delivery and voluntary acceptance of cargo is deemed equivalent to complete performance, and legally discharges the master from the duty of proceeding on to the stipulated port of destination; so capture may be viewed as a constructive delivery, which equally relieves the carrier from further performance, or further attempt to perform. And should there happen a subsequent recapture, and the cargo shall be ultimately forwarded to its destination, the right to freight would be revived, and full freight become payable, subject only to the salvage claim of the recaptors. Though suspended, this right to freight was never legally extinguished. The voyage having been interrupted by the act of a superior force, and without fault, on the part of the master, no deduction would follow in consequence of the temporary delay and detention occasioned thereby.

With some exceptions, freight is allowed to neutral carriers, where the cargo is condemned as enemy property, according to the practice of the High Court of Admiralty. *The Atlas*, 3 Ch. Rob. 304 *n*.

But even on enemy's goods, neutral carriers are not entitled to full freight to their port of destination, if such carriers have been guilty of prevarication or falsehood in their evidence. *The Anna Christina*, Hay and Marriott, 163.

If a neutral conduct himself with good faith, he may carry the property of an enemy, subject, however, to its capture and the temporary detention of his vessel; in which case, he would be entitled to freight, and for its security, also to a lien on cargo, which would take precedence of captor's expenses. But where the trade is between ports of allied enemies the rule is reversed;

and captors are entitled to a lien on cargo for their expenses: thus taking precedence of neutral masters for freight. Between ports of two belligerents, however, the trade is a kind of middle case. The *Vrow Henrica*, 4 Ch. Rob. 343.

But as maritime liens will constitute the main subject of the succeeding chapter, the present chapter will be brought to a conclusion, after citing a few authorities, in addition to *Muller v. Germon* (3 Taunt. 394); in which it was determined that the recovery of freight would be barred by proof of carrying goods on an illegal voyage.

Among other cases in admiralty, is that of the *Emanuel* (1 Ch. Rob. 296), where it was held, that no freight was due to a neutral ship-owner, who had been engaged in the coasting trade of the enemy, especially if that were a trade not commonly open to foreign vessels; the *Rebecca* (2 *ibid.* 101), where freight was refused to a neutral, on cargo between the colonies and mother country of the enemy; the *Rising Sun* (*ibid.* 108), where it was held, that an act of spoliation of papers by the master barred the owner's claim for freight; the *America* (3 *ibid.* 36), where it was recognized as a general rule, that the owner would lose his freight, if his ship were going with false papers; the *Atlas* (*ibid.* 303 *n.*), where it was held, that neutral ship-owners were not entitled to freight on cargoes which had been condemned in cases of unneutral conduct in the colonial and coasting trade, or trade between the ports of allied enemies, and spoliation of papers; the rule being that property under contract to become the property of an enemy, on arrival in an enemy country, is to be deemed enemy property if taken *in transitu*.

The *Oster Risoer* (4 *ibid.* 199), in which it was not permitted to a neutral master to aver ignorance of the contents of cargo, and freight was refused on sail-cloth, described as linen, directed not to be opened by the master, and which was ultimately condemned as contraband; the *Allegoria* (*ibid.* 202), when freight was refused to a neutral master going from one enemy port to another.

There are one or two cases, where the contract was for a gross sum for the round voyage, without distinguishing between the outward or homeward freight. In the *Lady Durham* (13 *Jur.* 521), this entire sum, agreed to be paid for rent, hire, or freight of the vessel, is termed lump freight. In the *Norway* (*Br. & Lush.* 226, 377, and 404), there was a stipulation for a lump freight of £11,500 for a *Calcutta* voyage, to return with a cargo of rice. There were three several hearings and judgments in this last case, reported as above; and, as it was quite elaborately discussed both before the Admiralty Court and the Judicial Committee of the Privy Council, and at a recent date, its examination may well be commended to the student.

CHAPTER XV.

MARITIME LIENS.

A MARITIME lien is the tacit hypothec of the civil law; and may be defined to be a secret interest in the thing held (*re obligatâ*), which may be enforced against the thing (*rem obligatam*). In enforcing this right, the process will issue against it *corporaliter*.

A lien, therefore, of this description, attaches either to ship, cargo, or freight; and separately or conjointly. It is a legal privilege, taking the form and character of a debt, and may be presupposed to have originated in some contract, express or implied, or proceeding from some tort which may be cognizable in an admiralty court.

Like other obligations, a maritime lien may arise *ex contractu* or *ex delicto*.

If the lien attaches in consequence of wages due, or salvage, towage, pilotage, hypothecation, or bottomry, or for freight even, the lien arises *ex contractu* or *quasi ex contractu*.

But if the lien attaches in consequence of damages suffered by reason of collision, then the offending vessel (if any) would be held subject to a lien for the damage done; and the lien itself may be supposed to have arisen *ex delicto* or *quasi ex delicto*.

All liens of the former description, are deemed to be entitled to certain preferences, or ranking rights of

precedence and priority. This precedence sometimes depends upon dates; but mainly on superiority of merit. And that superiority of merit entitles a party to superiority of rank, from which legally and logically results his personal title to priority of payment.

In ranking or marshaling such rights of the parties, claiming and controverting, the court may be influenced by two considerations:—

First, the nature and value of the service; and

Second, the time when it was rendered.

Wages, ordinarily, take precedence of all other *ex contractu* liens; pilotage and towage rank next in order; then follow bottomry and salvage.

But supposable circumstances may entirely change the order of preference. For a service, subsequent in time, may acquire and possess merit altogether superior to that of a service prior in time, as the condition of things might possibly be such as to render the liens, first in order, totally unavailing, were it not for the superior and timely merit of those last in order; thus inverting the usual order of ranking.

This modification of the original ranking of liens is founded in reason, policy, and justice. In maritime affairs, it is both well and wise to encourage fresh risks for future security. In the *Mary Ann* (9 Jur. 95), it was held that the holder of a bottomry security might be preferred even to the original or antecedent wages, due to the mariners at the time of executing the bottomry security. The reason is manifest for thus reversing the order of merit and preference; as at that time, without the loan advanced upon bottomry, it may have been utterly impracticable for the master to proceed further on the voyage, unless extensive repairs were

forthwith made; wherefore the loan became a paramount necessity for the purpose of refitting, and the lender should be made as reasonably secure as the pledge of ship and cargo could make him. For which purpose all other liens or preferred claims must yield, or be retired and temporarily or partially suspended. As the lien for wages is the first in rank, if from necessity that is suspended, all others must be also, as matter of necessity.

For the like reason, salvage claims also may take precedence, under special circumstances, to all other preferred contract liens. The *Selina*, 2 Notes of Cases, 18. This is obviously just; for, unless it were so, timely and adequate salvage assistance might not be procurable; and ship, cargo, freight, and all might perish.

Generally, lien, by the common law, is a right of the party in possession to retain or hold another's property, if in his possession, until fully indemnified; or until certain demands of the former party are paid, satisfied, secured, or waived.

In strictness, lien is not a *jus in re* nor *jus ad rem*; that is, a common law lien is not a property in the thing itself, nor does it constitute a right of action for the thing. It more properly constitutes a charge upon the thing. 2 Story, 145, *Ex parte* John S. Foster.

The better definition would seem to be that a lien is in part a *jus in re* and in part a *jus ad rem*; it is a right in a portion of the thing, and a right also to a portion of the thing, until such right is fully liquidated. While the thing must be tangible, the right to it is felt only when the remedy for it is resorted to, which, in admiralty, is a proceeding *in rem*.

But maritime liens differ from the general common

law lien in this ; that neither actual nor constructive possession is necessary as an attribute of a maritime lien ; whereas possession is an indispensable accompaniment of a general lien. When once a maritime lien has attached to the thing, it thereafter resides in, travels with, and adheres to it until legally severed. It holds on with tenacity either to the thing or to its proceeds ; and such lien, whether for wages, salvage, bottomry, or necessities, follows the *rem subjectam*, indefinitely, through all its varied future transmutations or transformations. Its mode of existence is nothing ; for it is immaterial whether it be imbedded in specie, exist *in solido*, in cash, or its equivalent, choses in action, or bills of credit, provided they severally represent actual value and means to pay.

To constitute and continue a valid lien at common law, there is a positive necessity, which becomes an imperative duty, to retain possession ; but this is not an essential element or attribute of a maritime lien.

Acquisition of property by one's own fraudulent or unlawful act or violation of duty, is not, however, such a possession as will legally sustain a lien ; but in order to support it, a possession, justly obtained, is requisite. It would otherwise be simply occupation without either property or legal possession. The retention of the property after a lien has become extinguished, becomes a fraudulent possession. • 2 How. 406, *Randall v. Brown*.

The lien for freight is rather an exceptional inchoate right. In one sense, it is a maritime lien ; in another, it is not ; for a lien for freight may either be parted with, or waived, by parting with the possession of the goods, merchandise, or cargo. Thus, in the *Bags of Linseed* (1 Black. 108), a ship-owner lost his lien as carrier, by delivery to a consignee.

Generally, property passes, subject to the maritime lien. 13 Pet. 464, *Burton v. Smith*.

In the *United States v. Wilder* (3 Sum. 308), it was laid down as a general rule, that there was no lien against the government. To this there is at least one exception, found in a recent act of Congress respecting goods in public warehouses, which, for its importance, as applied to freight and lien, will be here inserted in full as follows: "Whenever the collector or other chief officer of the customs of any port, shall be notified in writing, by the owner or consignee of any vessel or vehicle arriving from any foreign port or place, for a lien for freight or any merchandise imported in such vessel or vehicle, and remaining in his custody, such collector or other officer is hereby authorized and empowered to refuse delivery of such merchandise from any public or bonded warehouse, or other place in which the same shall be deposited, until proof to his satisfaction shall be produced that the freight due thereon has been paid or secured; but the right of the United States shall not be prejudiced thereby, nor shall the United States or its officers be in any manner liable for losses consequent upon such refusal to deliver; and, if merchandise so subject to a lien, regarding which notice has been filed as aforesaid, shall be forfeited to the United States and sold, the freight due thereon shall be paid from the proceeds of such sale in the same manner as other charges and expenses now authorized by law to be paid thereon." Act of March 2, 1867, § 3, vol. 14, U. S. Statutes, p. 567.

But the better way, perhaps, to present a reliable definition of what a maritime lien is, will be to refer to the highest authority.

In the *Europa* (Br. & Lush. 97), may be seen the view entertained by Dr. Lushington, who adopts with deference the language of the Judicial Committee of the Privy Council, as prepared by Sir J. Jervis, and reported in full in the case of the *Bold Buccleuch* (7 Moore P. C., 284). After premising that maritime liens do not "include or require possession," he adds, that this lien "is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted, that where such lien exists, a proceeding *in rem* may be had, it will be found equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim *upon the thing*, to be carried into effect by legal process.

"This claim or privilege travels with the thing, into whosoever possession it may come.

"It is inchoate from the moment the claim or privilege attaches; and, when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached.

"This rule, which is simple and intelligible, is, in our opinion, applicable to all cases.

"It is not necessary to say, that the lien is indelible, and may not be lost by negligence or delay, where the rights of third parties may be compromised; but where reasonable diligence is used and the proceedings are had in good faith, the lien may be enforced, into whosoever possession the thing may come."

But, if not precisely correct to speak of the indelibility of liens, when other persons or parties may be injuriously affected by such attribute, it is quite certain that a maritime lien, as has been before stated,¹ is invested

¹ *Vide* pp. 129-130.

with these several qualities. It is universal, inalienable, inextinguishable, unassignable, and remains attached to the thing, until legally discharged.

Besides the liens for salvage, bottomry, pilotage, towage, and wages, which, though tacit, are tenacious, and the qualified or exceptional lien for freight, which sometimes attaches, there may be still other liens, either implied by law, or created by the acts of persons presumed to be authorized to fully represent the parties interested, as masters or other agents of the owners of ship or cargo, or charterers.

Thus, a master, under an invincible necessity, occasioned by stress of weather or sea damage, might resort to his implied authority for procuring necessities or repairs, to refit and enable the ship to pursue her voyage. In doing this, he may subject both ship and cargo to a lien for the liability so incurred, although it would obviously be more regular to effect a loan by bottomry or hypothecation. And whenever such lien once attaches to a thing, it permanently resides in or with the thing; unless, by sale or otherwise, the thing itself shall have thereby assumed a new form of legal existence; in which case, the lien glides or travels along with such new form, and attaches to the proceeds. Thus, by the sale of a ship, under a legal necessity, in a foreign port, a legal lien on the ship would thereby be legally transferred from ship to proceeds. Again *vide* *The Amélie*, 6 Wall. 18, and cases cited.

For those maritime liens, which are created by a peculiar emergency and dependent upon special circumstances, it would be difficult to prescribe any precise and general rule. They must be necessarily of a shifting and variable description and character. The adjudged

cases will, therefore, only furnish mere hints or suggestions, whereby the intelligent judge may be enabled to apply the maxims of the maritime law to such cases as may come before him, by the familiar process of analogy.

Nevertheless, it would seem to be not unsafe, to adopt as a guide, if not as an inflexible rule of practice, this proposition: that, when supplies are furnished for the purpose of expediting a ship on her course, and such supplies have been rendered necessary by the disability of the ship or the inability of the master, then the furnisher should be secured by a lien on the ship or the cargo, or on both.

An express agreement is not deemed to be a necessary prerequisite to the existence of a maritime lien. 19 How. 359, *Pratt v. Reed*; 1 Spr. 571, *The Sea Lark*.

Although it has been already stated generally, that liens are never severed till satisfied, still they may doubtless be lost by lapse of time, laches or voluntary and intentional waiver or other sufficient cause. But it would seem that neither the mere lapse of two or even six years of time would extinguish a lien, if there were no *constat* of laches also. *The Eliza Jane*, 1 Spr. 152; *The General Jackson*, *ibid.* 554.

As against *bonâ fide* purchasers, a lien should be enforced with due diligence and in a reasonable time.

In the *General Jackson* (*supra*), Judge Sprague said: "The rule is, that as against *bonâ fide* purchasers, the lien shall be enforced within a reasonable time; and what constitutes a reasonable time, depends upon the circumstances of each case. Generally a lien of this character should be enforced soon after the expiration

of the first voyage, after supplies or materials furnished, and it is only under peculiar circumstances, that it will be extended beyond such time.

“These liens are created for the benefit of commerce. Foreign vessels often require repairs and supplies. To enable the master to obtain them, a tacit hypothecation is given. But being unrecorded, third parties may not be apprised of their existence or extent. And, as against such parties, it is proper that it should be considered as waived, or extinguished, unless enforced with reasonable diligence.”

The lien on foreign ships for repairs or supplies, exists by the maritime law ; and the remedy by proceeding *in rem* is always open for material men ; but they have no such lien or remedy in the United States against domestic ships, except by the aid of special legislation by the different States respectively. By the decision of the cases of the *General Smith* (4 Wheat. 438), and the *Barque Chusan* (1 Spr. 39), it will be seen “that vessels belonging to one State, when in the ports of another, are deemed to be so far foreign that a lien for necessary supplies is created by the general maritime law.”

All liens arising under the general maritime law, are beyond the reach of local State legislation, and cannot be thereby impaired. Such legislation, if so intended, would, in that respect, be nugatory. Indeed, by the existing law of Massachusetts, express provision is made to save and protect such liens. And if any attempt were made to abrogate or limit them by local legislation, it would devolve upon the Federal courts to enforce them to their full extent.

A furnisher of provisions has a lien upon a vessel not in her home port, even though the master should

be under contract to victual and man her, and the furnisher knew that fact. *The Monsoon*, 1 Spr. 37.

A foreign furnisher of needed supplies, though also himself a consignee, may be secured by a lien on the vessel for the supplies so furnished. *The Eliza Jane*, 1 Spr. 152.

There are other recent decisions on this subject to which reference may be made. *The Aline*, 1 W. Rob. 119; *The Benares*, 7 Notes of Cases, Sup. 53; *The Chimera*, decided November, 1852; *The Saracen*, 6 Moore (P. C.) 285; *The Gustaf*, 1 Lush. 506.

In 2 Spr. 33, (*The Cargo of the Anna Kimball*), the acknowledged doctrine, that maritime liens are not dependent on possession, was reaffirmed judicially.

In the *Undaunted* (ibid. 194), that no lien existed in war time, for charter money; and, in the *Amy Warwick* (ibid. 155), that holders of lien were not regarded in prize courts.

Liens may be lost by waiver or credit or lapse of time and laches. Credit, given originally, destroys the lien; a draft, accepted subsequently, has a similar effect. The giving credit for supplies furnished to a foreign ship for a fixed time, does not extinguish the lien, nor does the permitting a ship to depart on her voyage without payment. *The Brig Nestor*, 1 Sum. 73.

Although a loss is possible, yet it seldom happens that a maritime lien becomes extinct by the voluntary act of the party to be benefited thereby. No possession is necessary to retain it; and the lien itself, being a secret inchoate right, tacitly following the thing, however it may change either in place, form, feature, or

mode of existence, remains attached to the thing in its original state or condition so long as it may so continue, or travels along with and adheres to its proceeds, should it become, by sale or otherwise, converted into money or its equivalent in value.

CHAPTER XVI.

TOWAGE.

TOWAGE is a maritime service, for which a lien security may attach to the ship or property, and which may, under peculiar circumstances, be exalted into a salvage service and rewarded as such.

There are several leading cases upon this subject; but at present, I shall refer only to two. The *Medora*, 1 Spinks, 17; and *The Princess Alice*, 6 Notes of Cases, 585.

In making these references, it is for the special purpose of giving what seems to be the most authentic and complete definition and description of this, at times, highly meritorious service. In the *Princess Alice*, Dr. Lushington, December 12, 1848, expressed himself as follows:—

“Towage may be described as the employment of a steamer to expedite the voyage of a vessel, when nothing more is required than the accelerating her arrival at the place of destination.

“Many circumstances, however, are constantly arising which will give to a towage service the character of a salvage service. It may be sufficient to mention some of them only; as where a ship is disabled in her hull or rigging; where she is aground, or where the performance of the towage service is necessarily at-

tended with danger, or extraordinary labor or risk to the steamer. These and similar distinctions and circumstances deserve very careful consideration ; for on the one hand, it would be exceedingly detrimental to owners . . . to have to pay, without adequate cause, for more than the accustomed towage service ; and, on the other, it would be unjust to the owners and crews of steam vessels, and detrimental to the general interests of commerce, for the vessels and men to incur extraordinary risk for a reward proportionate only to ordinary service."

Substantially, this exposition was again sanctioned in 1853, by the same high authority in the case of the *Medora*, *supra*.

In the *Batavia* (1 Spinks, 169), it appeared that the main shaft of a passenger steamer was broken. She was conducted by a tug ninety miles from London to Holland. A tender of £175 was made and refused ; but the tender was pronounced sufficient by the Admiralty Court ; and the towage or salvage libellants condemned in costs.

The rule for costs has been already referred to ; and, upon that question, may be consulted the following authorities : The *Emma*, 1 W. Rob. 16 ; and also The *Queen*, The *Chancellor*, The *Commodore*, and The *Albatross*, all cited in a note to The *Batavia* (1 Spinks), 175, and decided in 1853.

The *Harriet* (1 Spinks, 180,) was towed by the brig *Sheriton Grange* one thousand miles, and after fourteen or fifteen days, at length reached Plymouth in safety. The salvaged property was worth £3,800 ; and the sum awarded for salvage was £800.

Towage has been occasionally a subject of contract ;

but without or with contract, it is a service of such merit, at times, that no fixed stipulated compensation can be adequate remuneration for its merit, or properly fixed in advance. The service may be performed by tugs of small size and light draft, or by larger and more powerful steamers of corresponding value and efficiency. The celerity and success with which the service may be performed by large steamers, entitles such steamers to compensation commensurate with the service rendered. In such cases, more than mere towage will have been rendered; and accordingly, *extra* compensation should be awarded. Indeed the towage service may be raised to the rank of salvage service; and it would be discretionary with the admiralty judge to award a suitable percentage or an *aliquot* part of the value of the property relieved or rescued. And in fixing such amount, the court should duly consider the hazards possibly incurred by the steamer employed to serve in towing. Sometimes it is in the day-time, but it may be done at night. It may be in rough or smooth water; in safe or dangerous navigation; with many or no vessels on the route; at the hazard of collision or otherwise; with or without a pilot. And if it be borne in mind, that the tug or tow-boat, of any description, in case of collision, may be held responsible for damage occasioned thereby, it will strongly commend a towing steamer to enhanced remuneration.

There are several English cases and of a quite recent date, which may profitably be consulted and will be here referred to. *The Galatea*, Swab. 349; *The Martha*, Lush. 314; and *The White Star*, 1 Adm. & Eccl. Rep. 68.

But more particular reference will be made to the

American case of the *R. B. Forbes* (1 Spr. 328); as calculated to show in a strong light, the danger which a steam-tug or tow-boat may incur in aiding a vessel in or out of a frequented thoroughfare or crowded harbor, while performing the service of towage at customary towage rates.

The *Romance of the Seas*, a 1,600 ton sailing ship, was being towed out of Boston Harbor by a steamer of 350 horse-power (the two being lashed together side by side), when they collided with the *Eliza*, a lumber laden schooner, which was, on the 4th of June, 1856, beating up the harbor.

The collision took place between Long Island Light and the Castle.

The owners of the schooner libelled the *R. B. Forbes* for damage, and the question was whether the steamer *Forbes* could be held responsible?

For the defense, it was urged that the towing steamer was the mere motive power,—the servant, in fact, of the ship; that the whole control of both the ship towed, and the steamer towing, was in the owner of the ship, and, consequently, the ship or her owner were alone liable.

Judge Sprague said: "It is to be observed that the ship had no motive power of her own. Her sails were furled, and whatever motive power she had was imparted to her by the steamer. The only separate motion which the ship could have, would be such lateral motion as might result from a change of her rudder. The ship and steamer were so lashed together as to constitute one moving mass, whose momentum was the result of the steamer's motive power, acting upon the aggregate bulk and weight of both ship and steamer.

The steamer had the control of the ship ; and if there was negligence in causing the collision, the steamer must be held liable.

“The fact that the steamer was hired for the service of towage, can make no difference. This is a proceeding *in rem*, and not *in personam*. Generally, in a suit *in rem*, no regard is had to the ownership. One great benefit of such proceeding is, that the law puts its hand on the offending *thing* ; and, without inquiring who is the proprietor, gives a remedy in favor of the injured party, against the vessel itself which has caused the damage.

“It has been contended that the steamer was under the control of the officers, or of the pilot of the ship. But, if such were the fact, it would not exonerate the steamer, nor affect her liability, as to third persons.”

With such extreme liability, it is not surprising that cases of much merit should be marked by allowing extra reward ; thus exalting the service above the level or rank of a common and ordinary towage. And, therefore, it happens that men, engaged in the useful occupation of towage, may, under extraordinary circumstances of danger and difficulty, render such signal service to persons and property in peril, as to command the respect and commendation of all just and considerate judges in admiralty.

CHAPTER XVII.

LIS PENDENS.

THE pendency of another and prior suit for the same cause of action, and between the same parties, is good ground for defense, and should be taken advantage of by demurrer or in abatement.

The allegations usually are that the prior suit is still pending, that the object of both suits is the same, the parties the same, and the judgment or decree (if any) will be the same in each case.

The more recent of admiralty decisions is the case of the *Lanarkshire*, 2 Spinks, 189. In England, a suit *in rem* was instituted for the recovery of seamen's wages; in Canada, another suit *in personam* was brought for the same cause of action, and the owners of the ship appeared in the suit in England and pleaded prior suit pending in Canada; and this plea (*lis alibi pendens*) was adjudged a good bar, as the owners would be ultimately liable in both suits, if both should be allowed to be prosecuted to final judgment.

There are two maxims which have a special significance when applied to the subject of this chapter. The one concerns the State, the other concerns the citizen; but both are calculated (if observed) to promote the public welfare and individual security. The former is "*Interest reipublicæ ut sit finis litium*," and the latter is,

"*Nemo debet bis vexari (si constet curia quod sit) pro unâ et eâdem causâ.*" And both may materially contribute to promote in a community, and assure to the citizen, freedom from vexatious litigation.

The doctrine of *lis pendens* applies only to a proceeding directly relating to the thing or property in question. 7 Md. Rep. 537, *Feigley v. Feigley*.

To support a plea of *lis pendens*, the cause of action in the two suits must be alleged and shown to be the same. 1 La. Rep. 46, *City Bank, N. Orleans v. Walden*.

In all cases of concurrent jurisdiction, the court which first has possession of the subject, must determine it conclusively. 9 Wheat. 532, *Smith v. M'Iver*.

When the District and State courts have a concurrent jurisdiction *in rem*, the right to maintain the jurisdiction attaches to that tribunal which first exercises it and obtains possession of the thing. 1 Paine, 620, *The Ship Robert Fulton*.

In a pending suit to affect a third part, that party, be he purchaser or other person, must be persistently prosecuted. 1 Vern. 286, *Preston v. Tubbin*.

This persistency is essential to show that there is a pending prior suit still undetermined, and intended to be seriously promoted. Otherwise, if there be no *litis pendentia*, all foundation for the plea in abatement or demurrer is wanting. There must be some action necessary to keep the suit alive and in activity. That action is a *litis contestatio*; and a continued *litis contestatio* constitutes legally a *litis pendentia*. In short, there must be a serious contestation in both tribunals; otherwise this plea of *lis pendens* or *lis alibi pendens* is not available.

In the case of Certain Logs of Mahogany (2 Sum.

589), the plea was prior suit pending. And the court said : " This objection, being preliminary, must be taken by plea in abatement, and before *contestatio litis* is opened, or general defense is opened, or general answer upon the merits filed."

In *Lyman et al. v. Browne* (2 Curt. 560), it was laid down, that the two suits must be substantially the same ; and it was there said that, the plea of prior suit pending, to abate a second suit, must discover the same cause of action, between the same parties, where the same judgment is to be rendered, giving substantially the same remedy and not other and different, in any respect.

And if the distinct jurisdiction sought gives a process, as to person or property, which may obtain a satisfaction not within the reach of the first suit, the remedy is not substantially the same. To be the same, substantially, as matter of definition, seems to be much the same as declaring, according to the allegation in the plea of abatement, that the two suits shall not be other and different suits ; but both shall be precisely and unmistakably for the same cause of action and between the same parties.

In suits on foreign judgments, writs of right and entry, trespass against bankrupt and assignees, it has been settled that the plea of *lis pendens* is not available or sustainable, where the two suits are substantially other and different, or not precisely the same.

Two suits were brought in the Admiralty Court for mariner's wages and wrongful displacement or dismissal of a mate, in 1855 ; one against the owner, and the other against the master. *Sheffield v. Page*, and *Same v. Foster*, 1 Spr. 289 ; but Judge Sprague dismissed the latter with costs, and sustained the libel for wages and decreed accordingly.

A writ of right is not abated by the pendency of a writ of entry; nor is an action of trespass abatable by one of replevin in different tribunals. *White v. Willis*, 2 Wil. 87; nor are suits of assignees to be abated by the prior suit of a bankrupt. *Briggs v. Cox*, 4 B. & Cr. 920.

Some other cases may be referred to, such as *White v. Whitmore*, 1 Curt. 495; *Bowne v. Joy*, 9 Johns. 221; *Walsh v. Dunkin*, 12 *ibid.* 99; *Wadleigh v. Veazie*, 3 Sum. 165; *Newell v. Newton*, 10 Pick. 470; *Trenton Bank v. Wallace*, 4 Hal. 83; from all which it may be deduced, that no man ought to be vexed by a multiplicity of suits, and that it is for the public good to ultimately terminate all litigation: wherefore, when several suits are pending for the same cause of action, the plea of prior suit, or *lis pendens* or *lis alibi pendens* should be seasonably interposed to abate the former suit or suits, and thus protect a party from needless and useless litigation.

CHAPTER XVIII.

WHALING AND OTHER FISHERIES.

THE Cod-fisheries and Mackerel fishing of the United States are especially provided for by the legislation of Congress; and will only be referred to incidentally to elucidate some legal principle applicable to the rights and duties of those persons engaged in that species of trade, or to point out distinctions (if any now exist) between the mode of employing vessels in catching cod and mackerel and that of sending vessels for whales.

The whaling business is peculiar, distinguished by peculiar usages and customs, has a peculiar history, and, in New England, has proved to have been quite a profitable pursuit. Its history is not unlike other commercial occupations, which have ultimately enriched those who have extensively and early embarked in them. Few seriously and successfully engaged in the East India, South Pacific, and African trade, anterior to the New Englander. And none embarked more resolutely in the East India trade, or developed its advantages more effectively, than the enterprising merchants of Salem in Massachusetts.

But the Whaling business has been the growth of centuries; gradually shaped into its present prominence and proportions by the determined efforts of mercantile men, who became early attracted or attached to it, as a

pursuit, perhaps from the accident of birth or domicil. The time has been when, in New England, the pursuit and capture of the whale, for the commercial value of his oil and bone, were confined to the inhabitants of Nantucket, Cape Cod, and Martha's Vineyard.

But at a very remote period of history, the Dutch were extensively engaged in this business. Holland, France, England, and other northern European people are known to have followed it, for a certain portion of their former history, and to a known but limited extent.

The Dutch had 260 ships and 14,000 sailors employed in whaling as early as the year 1680; and it is well known that the New England colonists also early embarked in it as a productive and profitable but at the same time hazardous occupation.

In 1690, and for some fifty or more years subsequent to that date, the habit of the New Englander was to chase, catch, and kill whales in boats, in and about the shores and coasts of that settlement. But the whales having abandoned the coast, in 1740, the hardy northern fishermen of that colony followed them out to sea, in larger vessels.

At first, they were content with the bone and oil of the right whale; but Christopher Hussey, having been drawn or driven off the shore, was successful in capturing a sperm whale. Thereupon his example, whether the result of force or choice, was at once followed by all the hardy fishermen of Nantucket.

Statistics show that in 1778 Massachusetts alone had 304 ships and 28,000 sailors, employed in the pursuit and capture of the whale.

Up to the year 1783, it is supposed that the people

of Nantucket, Martha's Vineyard, and Cape Cod practically and substantially monopolized the whaling business. But a new competitor appeared to share with them in this pursuit and its profits; and New Bedford, now the largest whaling port in the world, outstripped all other places; and, perhaps, it is no exaggeration to state that at least one half of all the whaling business in the United States is conducted at New Bedford.

Most of the cases reported which have occupied the attention of courts have arisen on board ships belonging to New Bedford or Nantucket. The case of *Reed v. Hussey* (Bl. & How. 525), decided in another jurisdiction by Judge Betts in 1836, was in reference to a Nantucket ship; the *Frederick* (5 Ch. Rob. 8), in 1803, though nominally a French vessel, captured by an English ship, was a case in which the sailors, intervening for their wages, were Americans.

Indeed, all the authorities to be cited in this chapter, it will appear, were American vessels or in which American rights and interests were involved, with the exception of the *Sidney Cove*¹ and *Riby Grove*.²

The American cases to be cited in addition to that already referred to are *Barney et al. v. Coffin* (1825), 3 Pick. 115; *Baxter v. Rodman* (1826), 3 *ibid.* 435; *Grozier v. Atwood* (1826), 4 *ibid.* 234; *Bishop v. Shepherd* (1839), 23 *ibid.* 492, in the State Court of Massachusetts; in the Federal courts, *Coffin v. Jenkins* (1844), 3 Story Rep. 112, in which Mr. Justice Story is reported to have said, in relation to the whaleman's lay or share as compensation in lieu of monthly wages as a mariner: "This lay or share does not, according to the law, create any partnership in the profits of the voyage, as has been sometimes erroneously sup-

¹ 2 Dods. 11.

² 2 W. Rob. 52.

posed; but it is in the nature of wages for seamen in the common merchant's service, and is governed by the same rules. This opinion was adopted by Lord Alvanley, in the Court of Exchequer, in *Perrott v. Bryant* (2 Younge & Coll. 61); in *Mair v. Glennie* (4 M. & Sel. 240); by the Court of King's Bench, and by the Supreme Court of Massachusetts in Boston, in *Baxter v. Rodman* (*supra*), in *Rice v. Austin* (17 Mass. 195, 203, 206), and in *Grozier v. Atwood*, *supra*. The same doctrine was held by Lord Stowell in the *Frederick* (5 Ch. Rob. 8). Indeed I consider it too well settled now to admit of any reasonable doubt."

Superadded to these authorities, the (eighteen) reported cases decided by Judge Sprague, constitute all the law accessible at present upon the interesting and somewhat engrossing subject of this chapter.

These cases are *The Hibernia* (1844), 1 Spr. 78; *Luscomb v. Osgood* (1844), *ibid.* 82; *Jay v. Allen* (1846), *ibid.* 130; *The Holder Borden* (1847), *ibid.* 144; *Tompkins v. Howard* (1849), *ibid.* 167; *Brunent v. Taber* (1854), *ibid.* 243; *Knight v. Parsons* (1855), *ibid.* 281; *Payne v. Allen* (1855), *ibid.* 304; *Taber v. Jenny* (1856), *ibid.* 315; *Loverein v. Thompson* (1857), *ibid.* 355; *Hussey v. Fields* (1858), *ibid.* 394; *Bates v. Seabury* (1858), *ibid.* 433; *The Schooner William Martin* (1859), *ibid.* 564; and in 2 Spr. 56, *Hathaway v. Jones*; *ibid.* 61, *Bark Huntress*; *ibid.* 65, *Hall v. Hudson*; *ibid.* 68, *Hazard v. Howland* (1863).

The earliest case (the *Frederick*, *supra*.) occurred in 1803. A French ship, engaged in the South whale fishery, was captured by the English; the captured ship having on board American sailors. The prize ship was neither really or ostensibly American, but was avow-

edly French. Between France and England hostilities commenced 16th May, 1803, and a blockade of the Elbe and Weser was proclaimed June 28, and July 26, 1803. The hearing and decision was had on the 7th September, 1803. At the trial, the American master and mariners intervened, as claimants for their wages or specific shares, upon the ground, doubtless, that it was their property and must be restored to them as neutrals. But it was held otherwise, and they were taken to be French sailors; their national character was concluded by that of the ship; being on board an enemy ship, they could be deemed no other than enemy seamen, without relaxing the general rule; the *ratio* of wages, being the ordinary mode of carrying on that particular species of commerce (the whaling business), must be deemed a material part of the trade itself; and therefore the American sailors, being on board a French ship, were deemed by Sir William Scott to be precluded from claiming wages, while on board an enemy ship, which impressed upon them the same character.

This first case seems to have anticipated several of the subsequent judicial decisions, as to the legality of compensating whalemens by lays or shares instead of monthly wages.

The next case was in 1815 (the Sidney Cove), in which the mariner was adjudged to be entitled to wages, but not precisely upon the ground that an agreement for a lay or share in the profits was an exact equivalent. For, on the objection of Dr. Lushington, then of counsel for the respondent, so much of the summary petition, as related to the contract in the eventual voyage for whales and seals, was rejected by Lord Stowell; and the wages for £8 per month for the chief mate,

as stipulated for at London, was allowed. The objection taken was, that the agreement for a share of the proceeds or profits, after leaving New South Wales, was in the nature of a special contract, and so not cognizable in the Admiralty Court.

The other English Admiralty decision, to which reference is usually made, is that of the Riby Grove, which came before the court in 1843, when Dr. Lushington was the presiding judge of the Admiralty in England. And the same difficulty in regard to special agreement seemed to confront him as judge, as did formerly his predecessor in 1815, in the case of the Sidney Cove; when, upon the same ground, an exception was taken to the jurisdiction of the court; that is, that a court of Admiralty could not take cognizance of the stipulation for shares of the profits for compensation, because it was a special contract. And Dr. Lushington declared that he felt bound to reject the summary petition; as he did, ultimately, upon the three following grounds:—

“*First*, because the contract was a special contract, such as is described by Lord Tenterden as ousting the jurisdiction of this court.

“*Secondly*, because I conceive that I am confirmed by the authority of Lord Stowell in so doing.

“And, lastly, because the contract being in the nature of a partnership, I should have, in entertaining the question, to encounter such difficulties as would render it impossible for the court to arrive at a just and equitable result.”

With this reference to the English decisions of the Sidney Cove and Riby Grove, it is difficult to perceive how the conclusion can be reached, that the doctrine, as held by the highest authorities in England in Admi-

ralty, is in unison with those of the United States, as to the legality of compensation by lays; although such a doctrine seemed to have been foreshadowed by Sir William Scott in the earlier case of the *Frederick*, in 1803, and has been cited to that point by Mr. Justice Story in *Coffin v. Jenkins*, *supra*.

Passing then the English authorities, we come to those cases which are reported as decided in the American State and Federal courts.

The first of these cases in order of time is that of *Barney et al. v. Coffin* (1825), 3 Pick. 115; in which the opinion of the Supreme Court of Massachusetts was given by its Chief Justice, Parker; who, speaking of whaling voyages, said, "they are of themselves peculiar, and almost confined to Nantucket and New Bedford;" and of the whale fishery itself, as a branch of business of a peculiar character, where peculiar usages may be expected to be found. And usage, in commercial matters, either is or may become law. The usage for the captain to make advances to the mariners and retain out of their shares enough to cover his disbursements on their account, was there recognized to be right and lawful. C. J. Parker observed that "nothing can be more reasonable, and indeed necessary than that, in voyages of this sort, which are prosecuted from pole to pole and through almost every climate, the wants of the seamen should be supplied; and if there were no security upon their earnings, there would be nobody to advance."

In 1826, in the case of *Baxter v. Rodman*, the same objection was revived which was made in 1815 in the *Sidney Cove* (*supra*), viz.: that, as the mariners were to share in the proceeds, they were legally and technically

joint owners or *quasi* partners in the voyage. But that was then said not to be law; and C. J. Parker, in giving the opinion of the court, said: "The owners of the vessel and proprietors of the voyage are the owners of the product of the voyage. The true meaning of the shipping contract is, that the men shall be paid out of the proceeds in a stipulated proportion. It is an agreement as to the mode of compensation, and gives them no property in the oil, but only regulates the amount of compensation. This, we think, is the true construction."

Another usage, in this peculiar species of business was recognized as lawful. The usage proved was *mateship*, which is to establish a species of partnership in the business of taking whales and procuring oil; so that, if the vessels cruise together, they divide equally the oil obtained by both, before they separate; or, if they cruise separately, upon their first meeting afterwards, they make an equal division, by delivery of oil from the ship which has taken most to the ship which has taken least. If the vessels are then not full, they proceed again upon their business, either upon a new contract of mateship, or each acting independently. If the vessels, after an agreement to mate, accidentally separate, and do not meet again until the voyage is finished, neither can claim of the other, if either returns filled with oil. But when they do meet abroad after such mateship, the settlement and division of oil take place immediately, unless one has filled.

"A usage to mate vessels is common, and almost universal;" "is well known to merchants in Nantucket and New Bedford;" and "was of so long standing and so general, that the knowledge of all concerned in the whaling business would be presumed."

There may be disparity in the size and equipment of the ships, and, therefore, a seeming inequality in the terms of the division ; but, nevertheless, the division must be equal, according to the usage now established. Meanwhile, accident, luck, superior skill, and determination, may render the success of a smaller vessel for a limited time altogether greater than the achievements of a larger and even better equipped ship, during the same period of time. It is obviously a lottery, in which each must take his chance and both abide by the contract.

“The custom,” said the court, “must no doubt be lawful and reasonable : it is lawful if reasonable and useful. This is a custom coeval with the trade in which it is used. It arose, probably, when the trade was pursued on a smaller scale, with smaller vessels and less numerous crews than are usual now (1826); but it seems to have kept its ground, notwithstanding the changes in these particulars.”

By the Massachusetts State courts, then, these three several usages were judicially recognized, in 1826, as of long standing, well-founded, universally known, reasonable and useful, and, therefore, lawful. These usages were :

First. Mateship, so called ;

Second. Payment of seamen by lays or shares of the proceeds in lieu of monthly wages ; and

Lastly. The practice and power of a master to supply in advance slops or necessities to the seamen, and a corresponding right for him to reimburse himself ultimately out of the seamen's lays or shares.

So much was known to be recognized law here ; while, in England, the leading decisions in Admiralty

either rendered obscure or equivocal the doctrine indicated by the decision or *dicta* of Sir W. Scott in 1803 as likely to be adopted — that the mariners and merchants of whale ships were not legally partners, because the latter regulated the mode of payment to the former by setting aside for them a share of the proceeds of the voyage.

In 1836, the case of *Reed v. Hussey* (Bl. & How. 525), was heard in New York. The voyage was a whaling voyage, in a Nantucket ship. Two seamen sued for wages; one suit was *in personam* against Hussey, who was part owner; the other was a libel *in rem* against remnants of the ship and proceeds of the cargo; of which a proportion of 450 barrels of oil was decreed to the sailors; but, on a rehearing in the Circuit Court, Judge Thompson disallowed part, deducting \$138, and withheld costs from the libellants.

And in 1844, Judge Story, in *Coffin v. Jenkins* (*supra*), “considered it too well settled to admit of reasonable doubt” that lays or shares were lawful and created no partnership. Up to this period, there were indeed decisions, but not any system or code of law. A few usages had been judicially sanctioned; and the law, as just stated as to compensation, was upheld. Beyond this, there neither was then, nor is now scarcely the semblance of system or code except in New England. And if, fortunately, such system happens to exist there, it has been the product of the United States District Court in Massachusetts, and to be found in the valuable decisions of Judge Sprague, who has substantially created the law applicable to whalemens, whalers, and the whaling business.

Circumstances have imposed upon him the duty of

declaring, enunciating and methodizing the rules and principles applicable to the different test questions which have been raised before him ; and worthily did he meet the responsibility thus cast upon him.

In the eighteen reported cases to be found in the 1st and 2d vols. of Sprague's Reports, all the law of value on this trade is there either collected or created, decided or declared.

In *Knight v. Parsons* (*supra*), it was deemed to have long been decided that, in whale fisheries, the crew have no specific property in the oil, but only a right to the proceeds; and, on principle, therefore, those engaged in the fisheries (whale, cod, or mackerel,) stand upon the same ground. *Semble*, however, that by the contract the owners have the right to sell the fish in mackerel voyages, and the crew have only a pecuniary claim, calculated upon the amount of fish caught.

In *Tompkins v. Howard* (1 Spr. 167), if a sailor ships on board a whale ship, in a foreign port, for an *aliquot* part, he is entitled to that part of all the oil and other products taken during the voyage.

In *Jay v. Allen* (*ibid.* 130), owners of a whale ship are held responsible for seamen's lays, though the ship be condemned and sold abroad, and the master shall have embezzled the proceeds. This decision was founded upon the ground, that an owner is bound to furnish a ship suitable to bring the oil home.

In the *Hibernia* (*ibid.* 78), the owners could only retain, after examination and proof, what is found to be actually due to the master, for slops furnished the men, during the voyage, according to the decision in *Barney et al. v. Coffin*, 3 Pick. 115 ; but not to extend the doctrine there held.

In *Hazard v. Howland* (2 Spr. 68), it was held, that a co-owner might recover, by libel in Admiralty, his own lay, as master.

In the schooner *William Martin* (1 Spr. 564), that in a whaling voyage, a seaman, who should be appointed ship-keeper, would be entitled to ship-keeper's pay, according to its grade.

In *Hussey v. Fields* (ibid. 394), that the master might pay each man his proportion, in a foreign port, where a whaling voyage was broken up.

In *Luscomb v. Osgood* (ibid. 82), that the father of a minor son, not emancipated, was entitled to pay for the services of his son, during a whaling voyage, though that son went the voyage without the father's knowledge or consent, having hid himself in the hold of the vessel before she left her port of outfit.

In the *Holder Borden* (ibid. 144), that the remnants of a wrecked whaler may be lawfully used by the cast-away crew, for the purpose of constructing another sea-going craft for safety ; and such new craft, when so constructed, will legally become the property of those who constructed her.

In *Hathaway v. Jones* (2 Spr. 56), that the discharge of a whaleman abroad, without any personal default, leaves him entitled to the same proportional settlement as if he had been discharged for sickness. Such discharge should be made before the consul abroad ; and the Admiralty Court will supervise and correct all erroneous payments made in a foreign port.

It is the duty of masters, to hear the proper complaints of all ; and particularly those of inferiors against superiors, if respectfully made.

In *Brunent v. Taber* (1 Spr. 243), no disability for

which a seaman is left abroad, if it be incurred in the service of a whale ship, will debar such seaman from recovering his full proportion of the ultimate proceeds, according to his time of service.

In *Loverein v. Thompson* (ibid. 355), seamen, separated without fault from a whaling ship, during a voyage, are entitled to their proportional part of the whole proceeds, according to their time of service.

In *Bates v. Seabury* (ibid. 433), for a wrongful discharge, a seaman is entitled to indemnity. If compelled to assent under duress, or from a well-grounded fear of subsequent ill-treatment, or other improper inducement, such involuntary assent will not bar his recovery of whatever may be found to be lawfully due him.

In *Hall v. Hudson* (2 Spr. 65), *semble*, that a custom exists in Mattapoisett and New Bedford, to pay a mechanic part-owner his bill for blacksmith or other work on whale ships, without waiting the general settlement of accounts; but such bills, however, await the settlement of the outward account; there being, in a whaling voyage, two accountings.

In the bark *Huntress* (ibid. 61), Judge Sprague said: "Merchant ships would be more careful about courses than whale ships.

"If a vessel is making a passage, where time is of consequence, the helmsman is more careful than in the case of whale ships on cruising grounds."

This case was one of collision, and reference is made to it rather for its *dicta* than decision in this connection.

In *Taber v. Jenny* (1 Spr. 315), a whale, killed, anchored, and left with marks of appropriation, is the property of the captors; and the original captors cannot be divested of that property by another party, even

though the whale may have dragged from its first anchorage.

In *Payne v. Allen* (ibid. 304), held, that a receipt given abroad is not a legal release beyond what a whaleman actually receives.

It is submitted that in these appropriate and practical decisions of the United States District Court in the First Circuit, there is matter enough to enable the student to extract a complete system of this branch of the law. Without, then, any disparagement to Scott, Story, Betts, Lushington, or other eminent Admiralty judges, it cannot be deemed exaggeration to state and repeat the statement that Judge Sprague has practically created the law at present applicable to the whaling business and the rights and duties of those engaged in it. Such has been his official position, and so ample his judicial opportunities, that perhaps he could not omit to accomplish thus much if he would ; and, judging the magistrate by the high-toned character of the former senator, it may be added, he would not have failed to achieve thus much if he could.

Seamen employed on board of ships engaged in the whaling business, have the same rights, privileges, and immunities as seamen employed in the merchant service. From fraud, oppression, imposition, and personal abuse, the mariner is alike protected by the maritime law, whether serving on board of either description of vessels. His special duties are distinctly defined ; his liability to ship's discipline is carefully prescribed ; and his legal right to compensation amply set forth in the shipping contract. For any willful breach of his contract, or disregard of discipline, the mariner's liability to punishment, and the master's authority to inflict it,

are both well recognized ; and the obligation to perform the precise service and the entire voyage for which he may have shipped, may be judicially enforced in the Admiralty courts. He is also liable to a forfeiture or deduction of wages, if he prove to be either incompetent or indisposed to discharge well the service which, by the articles, he is bound to perform, according to his grade or station.

On the other hand, the mariner, in whaling ships, as well as in merchant ships, is sedulously protected from imposition, wrong, or overreaching from superiors. If constrained to abandon his ship, or submit to a compulsory discharge, during the voyage, the penalties of forfeiture or deduction would not legally attach to the seaman. In the one case, it would be deemed an involuntary leaving, not amounting to constructive desertion ; in the other, it would be viewed as a wrongful discharge, and which, therefore, would exempt the mariner from all liability either to forfeiture or deduction. 1 Spr. 433, *Bates v. Seabury et al.* ; *ibid.* 167, *Loverein v. Thompson*.

So, in reference to the payment of whalemens and settlement of their lays or shares, the Admiralty will shield them from all attempts to take advantage, overreach or defraud them, either in settlement at home or abroad. If entitled to cash prices at the home port, such must be the basis of any settlement ; and the seaman is not bound to acquiesce in an adjustment, based upon consular rates in a foreign port.¹

For any settlement, a sailor's receipt is good only for what he actually receives. A receipt, even if made, in form, a release in full, will not cover any more than has really been paid to the sailor ; or acquit the officers or

¹ *Ante*, p. 421. *Hathaway v. Jones*, 2 Spr. 56.

the master from liability to damages for personal torts and ill-treatment. *Payne v. Allen*, 1 Spr. 304.

The extent to which the whale-fishery has been carried on in the United States, is probably unprecedented, and has been singularly productive of wealth. It has been managed with marked intelligence and corresponding success. The trained skill of the islanders of New England, in pursuing the whale, at first in small, and finally in larger vessels, have impressed indelibly upon this pursuit, as a commercial adventure, the stamp of success. The enterprise, thrift, and achievements of Nantucket and its immediate neighbors, attracted other neighbors, in that quarter of the country, to engage in the same pursuit with equal activity and energy; and thereby winning similar success. In this career of difficulty and danger, the early adventurers of the Old World have been comparatively distanced; and have now measurably abandoned their ancient fishing grounds, in the vicinity of Greenland, Iceland, and New South Wales.

To the statements already made, in the former part of the present chapter, may be added the facts, that, in 1837, France had forty-four ships employed in whaling; whereas, in 1858, the French had only three ships so employed. Holland, though formerly so very largely concerned in the whale-shipping interest, in the year 1854, had but three ships engaged in the occupation of pursuing and capturing the whale or seal.

Formerly the waters of the Northern Atlantic Ocean, near Greenland and Iceland, constituted the principal fishing grounds for English whalers, in capturing seals and whales for the skins, bone, and oil, thus obtained, as an article of commerce; while the Southern Atlantic

and Pacific oceans have, thus far, been the customary fields of operation for American whaling expeditions, in capturing and killing the right and sperm whales, for the bone and oil, to be thereby obtained for the commercial world.

The ships of Nantucket and New Bedford have hitherto supplied most of the material for litigation and adjudication in the courts of the United States; although New London, Fall River, Edgartown, Westport, Fairhaven, and even Salem, have, at times, been more or less actively engaged in the business.

The business, at the present day, has very materially changed hands and proprietors. In Europe it has greatly fallen off; but, in America it has greatly increased, is probably increasing, and likely to increase still more. It has been the gradual growth of time, and has now become one of the great material interests of the United States.

In this review of the authorities already existing, no attempt has been made beyond that of collecting for reference the cases, noticing the usages, and suggesting the propriety and practicability of so arranging the now existing law, as to found a system, and supplying material, adequate to form the basis of a useful treatise upon the subject. And the student, whose tastes or talents shall induce him to make of the subject of whaling in particular, or admiralty in general, a specialty, will find ample material to enable him to produce a valuable work or supply a great want to the profession.

OTHER FISHERIES have been heretofore regulated by the public acts of Congress and placed substantially on grounds similar to those upon which the merchant

marine service rests. By the U. S. Act of June 19, 1813, Congress prescribed the relations which were to subsist between the skipper, fishermen, and owners of vessels engaged in the cod-fishery, requiring the use of shipping articles, which prescribe the mode, time, and amount of compensation.

By the U. S. Act of April 4, 1840, § 4, Congress provided that whale ships should thereafter be subject to the same restrictions and entitled to the same privileges and immunities, as vessels engaged in the cod and other fisheries.

Authentic statistics show that the whale-fishery was, commercially, one of the great material interests of the United States. By a statement made by a member of Congress from the New Bedford District and published in the American Almanac for 1845, it appeared that the fleet of whaling ships was unprecedented in the history of commerce, — outnumbering the ships so employed by all other nations combined.

It was there stated, that the number of vessels engaged in the United States was, altogether, 650; their measurement 200,000 tons; their cost at the time of sailing \$20,000,000; requiring in officers and men 17,500 persons to man them.

The value of the oil and bone imported was \$7,000,000. Certain places in 1843, were largely concerned in this shipping interest; for instance, —

New Bedford had 57 vessels.

Sag Harbor, “ 25 “

Nantucket, “ 24 “

New London, “ 20 “

Fairhaven, “ 14 “

while other places were less extensively concerned.

CHAPTER XIX.

POSSESSION AND RESTRAINT.

THE quaint old maxim that "ships are made to plough the ocean and not lie or rot by the wall" is still measurably true and sensible. And where there happens to be a number of owners of one ship, the rule that the majority shall control still prevails.

But a single owner of a ship has the undoubted legal title, and right of possession, as well as the unqualified control and management of his own ship. He may rightfully employ her as he chooses, or let her lie idle and rot at the wharf; send her to sea, or keep her in the harbor; and it is not pertinent for others to intermeddle, as all loss, if any, would fall upon himself alone.

If, however, there be several owners of the same ship, each part-owner would desire to have his portion thereof profitably employed, as non-employment would entail a loss, which no prudent owner would voluntarily incur. Therefore it is, that certain rules exist by which the interests and rights of part-owners may be legally upheld and regulated.

The general rule is, that the control and possession of a ship is lawfully vested in the majority of the owners; nevertheless, the minority are not entirely divested of all right. The general rule may be qualified or con-

trolled in part. Should the majority undertake to exercise their right of possession, by sending the vessel upon an objectionable expedition, which does not command the concurrence or commend itself to the approbation of the minority, the dissenting owners are not left totally remediless. There yet remains to them the right to arrest; and, if the objecting minority seasonably apply for a warrant of arrest, and demand security for safe return, the court may detain the ship, until such demand is satisfactorily complied with. The safe return is not required to be at the particular port of outfit or departure, but it may be made at any port within the court's jurisdiction. *The Margaret*, 2 Hagg. 278.

In case the owners should happen to be equally divided, the moiety in possession cannot be legally dispossessed; but the dissentient moiety, not in possession, will retain the like rights and remedy as belonged to a dissenting minority. They also may arrest and detain the ship until the required security shall be given, unless by *laches* and delay, their conduct shall amount to what is termed *crassa negligentia*.

Accordingly, in all cases, application to the Admiralty Court, for a warrant to arrest for security, or to the Chancery Court, for an injunction to restrain from sailing, should be made seasonably and without unreasonable delay; otherwise the proceeding may be deemed vexatious, and the application for arrest or detention be refused. *Christie v. Craig*, 2 Mer. 137.

Prior to 1841, there were occasional applications to the Court of Chancery for injunctions to restrain the sailing of ships, until the requisite security for safe return, demanded by objecting part-owners, should be given. But, at present, this limited practice probably

no longer prevails; for by the act 3 & 4 Vict. ch. 65, § 4, jurisdiction was conferred upon the Admiralty Court, fully to decide questions of title to or ownership of either the ship itself or its proceeds, in causes of possession.

A cause for possession is instituted by a majority of the owners to eject the minority from possession; a cause for restraint, on the other hand, is instituted by a minority of the owners to prevent the majority in interest from sending the ship on a voyage, deemed objectionable, and to restrain the ship from proceeding on such voyage, until the minority have obtained satisfactory security to the estimated value of their portion of the ship.

A self-willed master, who may also be a part-owner, having possession as ship's husband or managing owner, may, from his position and relation to the ship, make much trouble for the majority in interest, and seriously expose their property to danger or deterioration. In this predicament, the proper remedy and, it may be added, only legal resort is to the process known as a cause of possession. The *Apollo* (1 Hagg. 307), was a case of this description: reversing, however, the parties in the suit. The captain was Charles Bryan Tarbutt, owner of three eighths of the ship *Apollo*; the other owners were William Tennant and John Nesbit, owners of the other five eighths of the ship. Tarbutt was master of the ship on several former voyages to the East Indies; but he and his immediate successor were deposed; and a third captain was in command, when the ship was lost. Tarbutt seasonably applied for, and obtained security for £3,000 from the court. After the loss, at his instance, a monition was issued against his co-owners and their sureties, to pay that sum into the registry for his

use. The amount of bail was brought in, subject to the order of the court; and an appearance was thereupon entered for the remaining owners. Between the parties there obviously existed deep feeling and animosity, and much irritation and mutual recrimination was the consequence. The ablest of counsel were employed, the case was fully argued, and, after careful consideration, the court pronounced for the enforcement of the monition, and the "immediate payment of money which had been so long and improperly withheld."

But Lord Stowell, though awarding "costs as generally due" to Captain Tarbutt, yet did so with this discrimination, that it would be "subject to the exception of any costs incurred for matter unnecessarily introduced by himself;" adding, "I think if Mr. Tarbutt chooses to lead up an irregular dance, he cannot expect to be paid for the steps he chooses to take in it." This case was decided in 1824; and is replete with valuable *dicta* and doctrines, elucidating this subject. If not the principal and prominent case, it certainly is one of the few leading authorities upon possession and restraint of ships among owners.

Another case of an earlier date (1820), was the *Frances of Leith* (2 Dods. 420), in which the owners of three fourths interest brought a suit for possession, not to get it, for they were already in possession. It turned out, however, that the suit was instituted *alio intuitu*; to wit, to get possession of the ship's registry, which was in the hands of a London merchant, but the court declined to interfere.

A third case, the *Margarett* (2 Hagg. 275), occurred in 1829. Security for safe return had been given by bond; but the vessel, on her return to England, was

carried, from necessity and distress, into another port than that of outfit or departure; to wit, Plymouth instead of Hull. But the court refused to pronounce for the forfeiture of the bond, upon the ground that the vessel having returned within the jurisdiction of the court, she was substantially returned to the legal possession of the owners, thus practically restoring them to their original situation.

Other English Admiralty cases may be referred to; such as *The Thomas*, 1 Ch. Rob. 322; *The Guardian*, 3 *ibid.* 93; *The Aurora*, *ibid.* 133; *The Cosmopolite*, *ibid.* 333; *The Sisters*, 4 *ibid.* 275; *The Countess of Lauderdale*, *ibid.* 283; *The New Draper*, *ibid.* 290; *The Martin of Norfolk*, *ibid.* 297; *The Peggy*, *ibid.* 304; *The Victoria*, Edw. 97; *The Fanny and Elmira*, *ibid.* 117; *The Johan and Siegmund*, *ibid.* 242; *The See Reuter*, 1 Dods. 23; *The Warrior*, 2 *ibid.* 288; *The Partridge*, 1 Hagg. 81; *The John of London*, *ibid.* 242; *The Pitt*, *ibid.* 245; *The Egyptienne*, *ibid.* 346 *n.*; *The Fruit Preserver*, 2 Hagg. 181; *The Lagan*, 3 *ibid.* 418; *The Valiant*, 1 W. Rob. 67; *The Lusitano*, *ibid.* 166; *The Elizabeth and Jane*, *ibid.* 275; *The John Dunn*, *ibid.* 161; 25 Eng. L. & Eq. 592, *The Virtu*; Lush. 28, *The Tamarac*; Swab. 160, *The Empress*; *ibid.* 408, *The Victoria*; 2 Spinks 30, *The Graff Arthur Bernstorff*; Br. & Lush. 65, *The Idas*; *ibid.* 161, *The Corner*; 1 Ad. & Eccl. Rep. 72, *The Innisfallen*; *ibid.* 45, *The Flora*; *ibid.* 77, *The Meggie*; *ibid.* 314, *The Cathcart*.

From these cases it may be gathered, that two distinct remedies are possible for co-owners: one is to secure justice to the majority; the other, to protect the minority. Upon any casual disagreement about the employment of a ship, each has its respective remedy:

for the majority, a resort to a cause of possession is open; for the minority, to a cause of restraint.

The *Virtu (supra)* was a cause of possession, whereas the *Innisfallen (supra)* was a cause of restraint; in the *Victoria (supra)* it was a question of legal and equitable title; and in the *Cathcart (supra)* of unlawful arrest.

By law, therefore, co-owners may apply to the courts for judicial protection. An obstinate minority cannot compel the ship to rot in idleness at the wharf; nor can an inconsiderate majority of owners, by mere will, send a ship on an illegal or otherwise objectionable voyage, without first giving to the dissentients security for safe return.

CHAPTER XX.

BAIL IN ADMIRALTY.

IN the common law courts, recognizance is a bond given by the acts of the court, to a party for his personal security. In the Admiralty, bail is given to the court directly for the thing, its substitute, substance, or precise equivalent. It is immaterial what may be the form of the instrument, whether it be by bond, stipulation in the nature of a recognizance, or by other form of instrument, sealed or unsealed. But whatever be its form, the instrument itself is usually taken upon the voluntary application of the claimant, and by the court's command; so that its jurisdiction would rightfully exist and extend, not only over the principal cause, but also over all its incidents. *The Alligator*, 1 Gall. 149.

Bail in admiralty, is not, then, like the ordinary recognizance given to a sheriff or a party in other courts, a mere personal security; but it is a stipulation for the thing, whenever an Admiralty Court shall, by order, decree, or other judicial act, command its arrest, seizure, or production. Perhaps no better general definition of bail in Admiralty than that given by Sir William Scott in 1811 (1 Dods. 50, *The Neid Elwin*), can be referred to.

The obligation of the sureties (*fidejussores*) is given

to the court; and whenever several persons without the claimant enter into such stipulations, all are deemed to be held as principals; and none are released from their obligation by lapse of time. The Vreede, 1 Dods. 1.

The basis of giving or requiring bail, is a proceeding *in rem*, in the Admiralty courts. It may be proffered or taken on the arrest of a ship for salvage or other private claim; or it may be tendered and taken by consent of parties, upon capture, for the purpose of releasing the prize, or captured cargo, before final adjudication. In this latter case of bailing captured goods, before final or interlocutory decree, great caution and circumspection are required of the court, as the bailing may tend to benefit the enemy; particularly if the intervening claimant be a real, supposed, or asserted neutral. Therefore, when bail is proffered, either after the preparatory evidence and before farther proof, or after farther proof and before adjudication, any Admiralty Court would be justified in declining to take the proffered bail, at such stage of the proceedings; and for numerous well founded reasons.

As in the *Neid Elwin* (*supra*), Sir William Scott well defined bail, so in the *Amy Warwick* (2 Spr. 152), Judge Sprague has well enumerated the objections to accepting bail in case of prize, upon demand of a neutral claimant. "There are very serious objections to delivery of captured property on bonds to claimants, which have always weighed with prize courts. Before the hearing in preparatory, it cannot well be judicially known that the claimants are not enemies, or that they have such absolute title on the property as to be the persons to whom it should be restored, in case it should

be decided to be no prize — beside the consideration that the captured property may itself be evidence. If, on the hearing, their claim remained in doubt on any of those points, why should they take the property rather than the captor? The court must be careful to deliver the property to none but the actual owners, and persons who would not pass it to any enemy for whom they might act.

“There are other difficulties attending this course. It throws on the captors the risk of the sufficiency of the bondsmen at the time, and their continued solvency until the final decision in the appellate court.

“It gives the claimants the chance of abiding or not abiding by the appraisement. If it is low, they would adopt it and give bonds, and so make a profit at the expense of the captors. If the appraisement is to the full value, they may decline to give the bonds. And there is always danger of undervaluation, not only by fraud, and by the pressure of interests in the trade, but from erroneous principles of estimation.

“A public sale is the best and fairest proof of value, and the most satisfactory course is to sell the property, deposit the funds in the registry to be delivered to the parties finally decided to be entitled to them, where there are no special circumstances.”

By the U. S. Prize Act of June 3, 1864, § 26, however, the Federal courts are empowered expressly, in certain cases and at particular stages of the proceedings, to deliver the property on stipulation or deposit of its value: as where restitution has been decreed and the captors have appealed; or where, after full hearing, the court has refused to condemn upon the preparatory proofs, and has given the captors leave to take further

proofs; or where the claimant of any property shall satisfy the court that such property has a peculiar and intrinsic value to him, independent of its market value.

Besides the authorities already referred to, a few others may be cited: such as in England, *The Saracen*, 10 Jur. 398, and 2 W. Rob. 451; *The Seringapatam*, *ibid.* 1065, and 3 W. Rob. 38; *The Copenhagen*, 3 Ch. Rob. 178; *The Peggy*, 4 *ibid.* 304; *The Betsey*, 5 *ibid.* 295; *The Jonge Bastiaan*, *ibid.* 322; *The Partridge*, 1 Hagg. 82; *The Harriett*, 1 W. Rob. 192; *The Tamarac*, Lush. 28; *The Corner*, Br. & Lush. 161; *The Flora*, 1 Ad. & Eccl. Rep. 45; and in the United States, *The Lively*, 1 Gall. 315; *The Ship Euphrates*, *ibid.* 451; *The Struggle*, *ibid.* 476; *The Grotius*, *ibid.* 503; *The Gran Para*, 10 Wheat. 497; *The Palmyra*, 12 *ibid.* 1; and *Lane v. Townsend*, Ware, 286.

On three contingencies only, then, in the United States, are the Federal courts permitted to exercise judicial discretion, in delivering prize goods on bail. By § 26, U. S. Prize Act 1864, already referred to, they are thus expressly prohibited: "No prize property shall be delivered to the claimants on stipulation, deposit, or other security," except as before stated.

And this constitutes the general rule; while the permitted instances constitute the exceptions to that general rule.

CHAPTER XXI.

- MISCELLANEOUS AND CONCLUDING CHAPTER OF PART I.

THE obvious aim and real purpose of the preceding chapters have been utility. An attempt has been made to collect and conveniently arrange in chapters the principal authorities applicable to the subjects of those chapters, so that the student may readily consult in one volume the leading decisions and doctrines touching a particular subject by turning to a single chapter.

With this view, the author has successively treated of the various subjects of maritime jurisprudence, admiralty jurisdiction, the accepted meaning of admiralty and maritime as terms, collision, salvage, general average, bottomry, necessities, master's power of sale, mariner's wages, witnesses, pilotage, recoupment, freight, liens, towage, *lis pendens*, whaling, causes of possession and restraint by co-owners, and bail; and it now remains to conclude abruptly what constituted the principal part of the original design of this treatise. In its execution there may appear to be omissions and imperfections, of which none can be more conscious than the author. But such omissions can only be supplied in a future edition, if called for, should Providence spare me life, health, and ability to superintend such publication.

In setting forth the principles of maritime law, by which the rights of merchants and privileges of mariners

are upheld and vindicated in admiralty courts, some minor omissions have seemingly occurred, which, though elementary law, may properly enough find a place in this closing chapter.

A RECEIPT IN FULL, fairly made, intelligently signed, and mutually understood by the parties thereto, ought in law to operate as a final release and full discharge from future liability to claims for debts, injuries, or torts. So, indeed, it would operate, both legally and equitably, if it were thus obtained ; but not if otherwise obtained. Such a receipt, procured from a mariner under duress, or any species of fraud or compulsion, may be inquired into.

Thus, in 1839, a receipt for \$5, purporting to be in full for wages of five times that amount, beside acquitting the master and officers of all claims for torts was held by Judge Ware to be nugatory, and no estoppel, though under seal. *The David Pratt*, Ware, 495.

In 1855, another like receipt for \$500 was held by Judge Sprague to be equally unavailing and inoperative. *Payne v. Allen*, 1 Spr. 304.

Seamen are not bound by improper deductions made at the time of payment of wages. *Knight v. Parsons*, *ibid.* 279. But by a fair composition, intelligibly presented, and well understood at the time by the mariner, he is legally bound. 1 Pet. C. C. 182, *Thompson v. Faussat et al.*

In the Admiralty, these receipts are never conclusive, but always open to explanation, and upon satisfactory evidence, may be restrained in their operation. 3 Mason, 541, *Harden v. Gordon*. •

Generally, receipts to release torts without consideration, given on payment of wages merely, will only

release the wages actually paid. 2 Sum. 1, *Thomas v. Lane*.

FOR SHORT ALLOWANCE, there is a statute remedy, securing to the suffering sailor suitable redress. *The Mary, Ware*, 454; *The Mary Paulina*, 1 Spr. 45; *Foster v. Sampson*, *ibid.* 182; *Collins v. Wheeler*, *ibid.* 188.

DROITS IN ADMIRALTY are peculiar to English law. Being the lawless depredations of non-commissioned cruisers, and failing to reach the rank of lawful prize, they become forfeited as droits or perquisites of the Admiralty. *The Aquilla*, 1 Ch. Rob. 32; and *Property Derelict*, Hagg. 383.¹

In the United States, such seizures belong to the Government; and as such, are condemned *jure reipublicæ*, and not as perquisites of the Admiralty.

At this stage of the present undertaking, it is proposed to pass from the first part, or instance side of the Admiralty Court, to the second part, or prize side of that court. The labor is easy and the transition grateful. Without aspiring to the claims or skill of a graceful authorship, it is hoped the treatise, when completed, may result in an unpretentious specimen of at least useful authorship. The whole commercial world is deeply interested in the capture, release, or restitution of prizes of war. The future discussion is to affect States as well as citizens, and may therefore deepen in interest.

¹ *The Joseph*, 1 Gall. 558.

PART II.



PRIZE LAW, PROCEEDINGS AND PRACTICE.

PART II.



PRIZE LAW,

PROCEEDINGS AND PRACTICE.

PRIZE CAUSES.

IN Admiralty there are two tribunals; the one known as Instance Court, the other as Prize Court. Prior to 1782, the English common law jurists seemed generally unaware of this distinction.

But in that year, in *Lindo v. Rodney* (Doug. 613), Lord Mansfield gave an exposition, which was accepted at the time as sound law and historically well founded doctrine; judicially pointing out this distinction between the instance and prize side of Admiralty courts, and which has since been recognized and adhered to by the profession generally, both in England and the United States.

In England, the Instance Court entertains and exercises all the ordinary jurisdiction claimed by, or conceded to, English Admiralty courts; while prize courts, as such, only entertain and exercise a peculiar but extraordinary jurisdiction specially conferred by act of Parliament, and to be exercised in time of war only.

The one is permanent and perpetual, daily sitting and hearing causes within its ordinary jurisdiction, as well in time of war as of peace; while the other has only an occasional existence, being called into requisition by war, continuing during such war, or perhaps so long after the termination of hostile relations as will permit all prize causes to be finally heard and determined.

In England, over one presides a single judge acting under a commission; which commission retains and sustains him in office during good behavior; while the business of prize courts is transacted in England by commissioners, specially appointed to act during the particular exigency which required such special appointment, and then their functions cease.

The Instance Court exists under and by virtue of standing and traditional laws; the Prize Court is called into existence by special statute in consequence of hostile relations existing with another people; and its aid is regularly invoked during the continuance of such hostile relations between the belligerents.

Such is the state of the law of England in reference to the general jurisdiction of prize courts in that country, and their connection with admiralty tribunals as there organized.

But in the United States, prize and instance courts are both alike permanent and perpetual; neither of them existing, as in England, only occasionally, by reason of war declared, or hostile relations existing.

The District courts of the United States are ever open to prize causes, and may exercise all the powers conferred upon prize courts, either by express law, or as recognized to be inherent in such tribunals by the inter-

national law, or the customs and usage of nations. The district courts here are perpetually open as instance courts also.

How the jurisdiction of prize courts may be exercised and their powers confirmed, may be illustrated by a brief reference to adjudicated cases, and a general statement of the pleadings and practice in prize causes.

Both in England and the United States, the practice in prize courts and the hearing and decision of prize causes are similar, and withal much facilitated by what are designated as the standing interrogatories, used in all prize proceedings.

Not only have the captors special duties to be attended to, but the captured also are expected and required, as matter of duty, to preserve papers on board, when captured, as well as to furnish documentary and oral evidence of national character, domicile, and proprietary interest of vessel and cargo; both by officers and crew of the vessel captured.

Whenever a vessel is captured as a prize of war, the captor is bound to preserve with care all papers and writings found by him in the vessel captured; and studiously to refrain from removing any money or other property from the prize, unless it be for its better preservation, or the necessary use of the vessels of war or government ships making the capture.

Any act, on the part of the captor, either of negligence, spoliation, or fraud, will materially affect his standing, and prejudice his claim in a prize court, and just as injuriously as does embezzlement, whether it be proved or admitted.

Possible controversy between captor and claimant, renders it imperative upon the former to conform to all

that is required to be attended to, after capture, and before the arrival of the prize in port, as well as after arrival and before adjudication by the Prize Court within the district at which the prize shall first arrive ; and where, accordingly, the prize must be libelled, either for condemnation or acquittal.

Thus, upon capture, proper preparation must be made by putting on board the prize a prize master and crew ; securing and sealing up the papers found on board at the time of the capture ; sending home with the prize her master or principal officers, with others of the crew, for examination preparatory to adjudication ; and dispatching with promptitude the captured vessel to some convenient district for libelling, with instructions for the prize master to report without delay to the judge or commissioners, as may be required by the local law of the district to which the prize may have been ordered.

And, after arrival and report made, and when possession shall have been taken of the prize, the resident commissioners of the district are to proceed at once to take, under the standing interrogatories, the preparatory examination of the prize crew ; libel the prize for condemnation, and return the depositions and other documents, sealed up, to the judge of the court within whose jurisdiction the prize shall have arrived, or cause the same to be done through the Government attorney.

Thereupon, if no claimant, after due notice, shall appear to contest the captor's claim of lawful prize, the vessel may be condemned upon the *preparatory evidence*, without further proof, by the court having jurisdiction, or further delay ; and the like disposition, after a year and a day, is admissible as to goods found on board at the time of capture, if no claimant then appears.

This delay to condemn goods as prize, as promptly as the condemnation of the vessel, may be in deference to the possible rights of neutral shippers in part ; partly to international comity ; and possibly to save captors from subjecting themselves to any possible liability to damage or costs from innocent, neutral, or not hostile owners of such goods ; which might and does follow, where the court should decline to certify probable cause.

The main purposes to be effected in prize proceedings are, legal condemnation of lawful prize, and just distribution of the proceeds.

If the condemnation be valid, that decision settles also several other questions often raised, such as the nationality of the prize ; the domicile of the master, crew, and owners ; the lawfulness of prize, and liability to sale by the marshal for the purpose of depositing the proceeds in court for distribution, or with the registrar for future disposition by the court.

And these matters may be determined by the court, upon the evidence *ex* or *in preparatorio*, without resorting to further proof ; ordinarily they are so determined upon the papers, proofs, and documents, returned by the commissioners, and answers to the interrogatories, where no claimant appears to contest or resist condemnation.

Afterward, if any claim of joint capture, actual or constructive, be interposed, it may become the duty of the court to permit, order, or resort to farther proof, with a view of settling the relative rights of conflicting claimants and determining the respective shares to which each vessel, upon the ground of joint capture, presence, or signal distance, is justly entitled ; to the end

that is required to be attended to, after capture, and before the arrival of the prize in port, as well as after arrival and before adjudication by the Prize Court within the district at which the prize shall first arrive ; and where, accordingly, the prize must be libelled, either for condemnation or acquittal.

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that a just distribution of prize money may be decreed among all persons who may have meritoriously participated in the capture.

In recognized national warfare, captures are made of prizes while they are flying their own national flag; in which cases, the preparatory evidence is likely to afford sufficient ground for speedy adjudication, and as prompt condemnation. These cases, while they may illustrate the daily routine and practice in proceedings before prize courts, furnish but little of law or learning for the student, and nothing indeed of authority for settling prize causes, where there is controversy.

It is only to contested cases that we may look for a vigorous enunciation of the principles of prize law, and their just application to existing facts: accordingly, after a careful reading of the interrogatories to be propounded to the master of the vessel captured, or others sent in with the prize to be interrogated agreeably to the forms as framed in England (1 Ch. Rob. 381) and in the United States (2 Wheat. App. 81),¹ the formal practice becomes secondary compared with the study and examination of the adjudged cases.

Indeed, unless there exists fraud, embezzlement, spoliation, prevarication, subterfuge, or some other just cause for suspicion, the answers to the standing interrogatories, if fairly made, ought generally to furnish ample material for the judge of a prize court to proceed to adjudication, without necessarily resorting to further proof, or causing procrastination.

And this is usually so, if there be no concealment, suppression, or destruction of documents and papers, or subterfuge, evasion, or unfairness in giving the answers;

¹ *Vide* Appendix L.

for the interrogatories are well calculated to elicit all the needful facts, and exhaust the inquiry. They are doubtless well considered and designed to cover every possible ground of escape, and long experience seems to have satisfied both courts and practitioners with their sufficiency.

Nevertheless, it has always seemed to the author, whenever he has read them, that those of the United States would be materially improved by an additional forty-seventh interrogatory, running thus :—

“What, if you know, was the real national character of the captured vessel and cargo ? Or, if you are without positive personal knowledge, what (according to your best knowledge and belief) was the understood national character of the vessel and cargo seized ?”

With this suggestion diffidently made, the transition is easy and natural to the consideration of the general principles of international and municipal law, which underlie the proceedings and control the practice of prize courts, as they may be gathered from the various reported contested prize causes and their adjudication as found in the Admiralty Reports.

In all controversies about prize matters, the nationality of the vessel seized, the domicile of her owners, master, and crew, her ports of departure and destination, her situation and course at the time of capture, her cargo, its character, and possible use, whether contraband or otherwise, and her colors on board, necessarily become, from the examinations *in preparatorio* material and important, in determining the proprietary interest of a claimant against captor.

It is then indispensable that the court should be

warranted in determining the *nationality* of the prize to be that of a belligerent.

The *domicile* of the owners and crew are only means to that end.

And so it may be said of all the facts designed to be drawn from the persons returned with the prize, for examination under the standing interrogatories.

By the act of Congress, ch. 50, March 25, 1862, it was enacted that prize commissioners should take the custody of captured property brought into their district ;

And, if perishing, perishable, or deteriorating, then the court may order interlocutory sale of the property by the marshal; the disposition of the proceeds to await the result of an adjudication ;

The commissioners were to receive from the prize master all papers and documents, and at once proceed to take testimony ;

And the court shall then proceed promptly and without unnecessary delay, to a hearing and adjudication :

And all reasonable and proper charges, with costs of counsel, were to be paid out of the proceeds of sale ;

Or by the claimant, in whole or part, as the court may direct, when the property is restored and there is no sale.

But this act, and prior and subsequent acts, relating to proceedings in prize, and the original act of 1800, March 3, for salvage or recapture, which together constituted all the Congressional legislation relating to prize and its incidents, were expressly repealed ; as will be seen by reference to § 35, U. S. Act of June 3, 1864, entitled "An Act to regulate prize proceedings and the distribution of prize money, and for other purposes," which may hereafter be referred to as the U. S. Prize

Act, and will be found printed at length in the Appendix.¹

In all prize proceedings in the United States, the original process is by libel in the district courts; and there all the preliminary questions of domicil, further proof, proprietary interest, and national character are to be settled in the first instance; and, unless there settled, the case would be remanded by the Supreme Court to the District Court with directions to settle such questions.

In *Miller v. The Resolution* (2 Dall. 12), it was held that, on a libel for prize, the *onus* was on the captor; while by the rules of a prize court, the *onus probandi* of a neutral interest rested on the claimant. 6 Wheat. 1, *The Amiable Isabella*; 5 Curt. Con. 1, S. C.

In these cases, it was held generally, that on adjudication, the questions of acquittal or condemnation must be decided, in the first instance, upon the evidence derived from prize documents and the examination of persons captured.

In all questions of prize or no prize the Admiralty courts have original jurisdiction. 1 Bay, 470, *Sarportes v. Jennings*; *ibid.* 8, *Jenkins v. Putnam*; also exclusive jurisdiction, see 1 Yeates, 443, *Ross v. Rittenhouse*; 3 Binney, 220, *Cheviot v. Fausset*; 3 Dall. 19, *Bingham v. Cabot*; 1 Curt. Con. 13, S. C.

And, as a general rule, the exclusive cognizance of prize questions belongs to the capturing power. 1 Wheat. 238, *L'Invincible*; 2 Gall. 29, *The Invincible*.

And the United States district courts have jurisdiction of prize and all incidental questions, independently of the act of June 26, 1812, ch. 430. 3 Wheat. 546, *The Amiable Nancy*.

¹ Appendix K.

So exclusive is this jurisdiction that, where the question is prize or no prize, the United States Supreme Court will prohibit proceedings at common law.

Neither can prize courts of belligerents be erected by belligerents in a neutral country ; nor, if erected, can they there rightfully exercise jurisdiction. The *Flad Oyen*, 1 Ch. Rob. 140 ; and 1 Johns. 471, *Wheelwright v. Depeyster*.

Nor have the Admiralty courts of neutrals jurisdiction over prize questions arising between belligerents. 1 Pet. Adm. 12, *Findlay v. Williams*.

But to recover prize money merely, prize agents may resort to the State courts.

Prior to the war of 1812, between Great Britain and the United States, the practice of the courts of prize in the United States was by no means regular and precise ; but, on the contrary, rather loose and irregular ; and, as such, it became the subject of animadversion and rebuke by the court.

In 1794, Sept. 10, when John Jay was the American Plenipotentiary at London, as an act of comity, a succinct summary of the course of proceeding in prize cases was prepared for him by Sir William Scott and Sir John Nicholl, the former then presiding in the High Court of Admiralty, the latter subsequently succeeding Sir Christopher Robinson in the same high judicial position.

The basis of this summary was a paper prepared by Sir George Lee of the Prerogative Court, Dr. Paul, Advocate-General, Dudley Rider, Attorney-General, and Mr. James Murray, then Solicitor General and afterward Lord Mansfield.

That paper remained the foundation and guide of

prize practice and proceeding until 1812, when the United States courts became considerably occupied by business in prize causes; some of which causes were carried up to the highest tribunal. Among them was the case of *Dos Hermanos v. Basil Green*, claimant (2 Wheat. 76), in which the court took occasion to comment on previous irregularities in prize proceedings, and judicially to admonish the bar against the recurrence of such irregularities in future. The decision was given in 1817, and the counsel engaged were Harper for claimant and Key for captor.

The language of the court was as follows: "It is the established rule in courts of prize, that the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured ship. On this account, it is the duty of the captors, as soon as practicable, to bring the ship's papers into the registry of the District Court and to have the examinations of the principal officers or seamen of the captured ship taken before the district judge or commissioners appointed by him, upon the standing interrogatories. It is exclusively upon these papers and examinations taken *in preparatorio* that the cause is to be heard before the District Court.

"If, from the whole evidence, the property clearly appear to be hostile or neutral, condemnation or acquittal immediately follows.

"If, on the other hand, the property appear to be doubtful, or the case be clouded with suspicions or inconsistencies, it then becomes a case of farther proof; which the court will direct or deny, according to the rules which govern its legal discretion on the subject.

"Farther proof is not necessary as a matter of course.

It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith.

“But if the parties have been guilty of gross fraud, or misconduct, or illegality, farther proof is not allowed; and, under such circumstances, the parties are visited with all the fatal consequences of an original hostile character.

“It is essential, therefore, to the correct administration of prize law, that the regular modes of proceedings should be observed with the utmost strictness; and it is a great mistake to allow common law notions in respect to evidence or practice to prevail in proceedings which have very little analogy to those at common law.

“These remarks have been drawn forth by an examination of the present record.

“The court could not but observe with regret, that great irregularities had attended the cause in the court below. Neither were the ship's papers produced by the captors, nor the captured crew examined upon the standing interrogatories. Witnesses were produced by the libellants and the claimant indiscriminately at the trial, and their testimony was taken in open court, upon any and all points to which the parties chose to interrogate them. And upon this testimony and the documentary proofs offered by the witnesses, the cause was heard and finally adjudged. In fact, there was nothing to distinguish the cause from an ordinary proceeding in a mere revenue cause *in rem*.

“This court cannot but watch with considerable solicitude, irregularities which so materially impair the simplicity of prize proceeding, and the rights and duties

of the parties. Some apology for them may be found in the fact, that from our having been long at peace, no opportunity was afforded to learn the correct practice in prize causes.

“But that apology no longer exists, and if such irregularities should hereafter occur, it may be proper to adopt a more rigorous course, and to withhold condemnation in the clearest cases, unless such irregularities are avoided or explained.”

Again, in the *Pizarro* (2 Wheat. 240), the court say: “The proceedings in the District Court were certainly very irregular, and this court cannot but regret that so many deviations from the correct prize practice should have occurred at so late a period of the war.

“The ship’s papers ought to have been brought into court and verified on oath by the captors; and the examinations of the captured crew ought to have been taken upon the standing interrogatories, and not *vidæ voce* in open court.

“Nor should the captured crew have been permitted to be reëxamined in court.

“Public policy and justice equally point out the necessity of an inflexible adherence to this rule.”

These opinions were prepared in 1817, and about the same time learned notes upon doctrines and cases regulating prize proceedings were prepared and published in the appendix to 1 and 2 Wheaton’s Reports; the authorship of which notes has been attributed to the late Mr. Justice Story, and not, probably, without cause.

From these sources are to be derived the law of prize, and the practice under it as recognized by prize courts. By referring to these, also to the letter addressed to John Jay, and to the adjudged cases to be found in

Marriott, Hay, and the regular series of Admiralty Reports in England since 1798, as well as the Reports of Dallas, Cranch, Gallison, and others in this country, the diligent student may easily collect all the principles and rules to be resorted to, for condemning as prize, or to be relied upon for acquittal as prize.

A not uncommon defense in prize cases is, that the goods captured are the property of a neutral. If a neutral claimant intervene, he should do so in Admiralty at the time of the hearing and adjudication upon the preparatory evidence. His defense, if well founded, may then avail him.

In 2 Wheat. 89 (*supra*), the court say: "It is certainly the duty of neutrals to put on board of their ships sufficient papers to show the real character of the property; and, if their conduct be fair and honest, there can rarely occur an occasion to use disguise or false documents.

"At all events, when false or colorable documents are used, the necessity or reasonableness of the excuse ought to be very clear and unequivocal, to induce a court of prize to rest satisfied with it."

Ibid. p. 97. "It is an established rule of this court, that if a party will attempt to impose upon the court by knowingly or fraudulently claiming as his own, property belonging in part to others, he shall not be entitled to a restitution of that portion which he may ultimately establish as his own."

"This rule is founded in the purest principles of morality and justice."

In the *Pizarro* (2 Wheat. 241), the court say: "Concealment or even spoliation of papers is not of itself a sufficient ground for condemnation in a prize court.

"It is undoubtedly a very awakening circumstance, calculated to excite the vigilance and justify the suspicions of the court. But it is a circumstance open to explanation, for it may have arisen from accident, necessity, or superior force; and if the party, in the first instance, fairly and frankly explains it to the satisfaction of the court, it deprives him of no right to which he is otherwise entitled.

"If, on the other hand, the spoliation be unexplained, or the explanation appear weak and futile; if the cause labor under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is made the ground of denial of further proof, and condemnation ensues from defects in the evidence, which the party is not permitted to supply."

In the *Anna Maria* (2 Wheat. 327), C. J. Marshall says: "The right to visit and *detain* for search is a belligerent right, which cannot be drawn in question.

"But this search must be conducted with as much regard to the rights and safety of the vessel detained as was consistent with a thorough examination of her character and voyage. All that was necessary to this object was lawful, all that transcended it was unlawful."

In the *Anna Maria*, upon libel, the owners recovered full damages of the captors, because the vessel, after capture and while in their possession, was lost through the fault of the captors. And the case of the *Der Mohr* (3 Ch. Rob. 129), was cited and relied upon as sustaining the principle of the decision, upon which the owners of the *Anna Maria* recovered full damage for their lost vessel. To complete the history of this judicial exposition by Sir William Scott, of the liability of captors to indemnify for their own or their agent's

misconduct, another case of the *Der Mohr* (4 Ch. Rob. 315), should have been cited. The former was decided June 24, 1800, the latter December 14, 1802.

But both grew out of the same transaction. The *Der Mohr*, on her voyage from Surinam to Altona, was captured by two British ships of war, commanded respectively by Captain Church, the senior, and Captain Talbot, the junior officer in command. The prize was committed to the junior officer, with directions to put a pilot on board, for the purpose of taking her through the Needles, and himself to accompany her to Spithead. A prize-master in charge refused the tendered services of a pilot, who was dispatched to him; and the vessel was lost, as was claimed by the owners, through the misconduct of the captors. In the first case, restitution in value of the ship was decreed to the owners; in the second, freight was deemed not to be limited to the proceeds of the cargo saved, and was decreed *in toto* against the captor.

Restitution was decreed, and accordingly the owner became entitled to full indemnity. Although the loss was through the ignorance, obstinacy, and general negligence of a prize-master, still his superior officer (Captain Talbot) was held responsible upon the ground, that "every principal is civilly answerable for the conduct of his agent." Though proper orders had been given, they were not properly executed, and thereby the loss occurred. For this loss, the neutral owner had a just claim for an entire indemnity, and could only seek it against the responsible and principal captor. It was a hard case for Captain Talbot, *miseranda vel hosti*; but he could be relieved only by the assistance of the government. This was anticipated by Sir William Scott; as

shortly after the decision in 1802, the court was informed that the amount of restitution had been ordered to be paid by the government, in aid of the captor.

The act of the Congress of the United States passed September 24, 1789, § 9, vests in the United States district courts as full jurisdiction of all prize causes as is exercised by the Admiralty courts of England. This jurisdiction of the district courts is an ordinary, inherent branch of their powers as courts of Admiralty, whether considered as prize or instance courts.

The language of the act is : " Shall also have exclusive original cognizance of all civil causes of Admiralty and maritime jurisdiction."

And it was early determined in *Bingham v. Cabot* (3 Dall. 19), that the questions of prize or no prize are exclusively of Admiralty jurisdiction.

In discussing the title to things acquired in war, *jure belli*, it will be convenient as well as more instructive to consider such title as threefold, and to classify these acquisitions accordingly,—

1. As things taken for booty.
2. As forced contributions or levies.
3. As maritime prize.

And *first*, booty may be defined as personal property captured by a public enemy on land ; differing herein from prize, inasmuch as that is personal property captured by a public enemy on the sea.

Whenever booty shall have been twenty-four hours in possession of the enemy, or has been carried by the captor *infra presidia* or within a place of safety, it thereupon becomes the captor's absolute property ; and if, moreover, it shall have passed *bonâ fide* into the hands of a neutral, then there remains no *jus postliminii* for the original owner.

The right of booty belongs to the sovereign, except where pillage is permitted ; and then it belongs to the private soldier. It is not, however, usual in modern times, for civilized nations to seize private property as booty.

Nevertheless, there are occasions when such a rule may be departed from, and the practice be not only tolerated but justified even and applauded ; as in the grand march of General Sherman to the sea through the Gulf States.

Secondly. Forced contributions may be designated as levies made by a belligerent force, invading a hostile country, and while in the occupation thereof ; and they serve to support the army of occupation there by means of a compulsory levy, or call for money or property, from hostile inhabitants, by order of the commander-in-chief of the invading force ; thereby rendering a resort to indiscriminate pillage unnecessary, and authoritatively prohibiting it.

Thirdly. The more general definition of prize would be this : —

Maritime prize is the taking of enemy property, water borne, on the high seas, whether ship or goods, by authority of a belligerent power, for the purpose of becoming master of part or the whole, with the intention of appropriating it.

With this general definition of prize, the further examination and discussion of the subject might be pursued and extended under the usual inquiries : —

Who can make prize ?

What may be captured as prize ?

What is sufficient capture ?

What is right of postliminy ?

What is ransom and when permissible ?

What is adjudication of prize or no prize and distribution of prize money?

As this extended discussion may possibly interfere with the original plan of the present treatise, I shall confine that discussion to three of those inquiries, namely: Prize, capture and adjudication.

1. And generally, nothing can be taken as prize, except by the authority of an existing government engaged in war; because no one has a right to make war unless it be an existing government, duly constituted for the time being.

In the United States, the power to make war is lodged in Congress.

By the law of nations, a formal declaration of war and notice thereof has heretofore been deemed essential; but this is not always an indispensable prerequisite.

Since the war of the United States with Mexico, if the *fact* be made known that *war exists*, that, of itself, is alone sufficient; being deemed now equivalent to a formal declaration, so that all rights and incidents, consequent upon a state of war, follow and flow from such proclaimed fact.

In such a condition of affairs, however made known, provided it have the sanction and assent of the government, authority may be given to private as well as public ships to capture and make prize.

Of course, it is quite superfluous to add, that an unauthorized capture is no prize; and none but a free-booter, corsair, or pirate will deliberately engage in such expeditions, or would be likely to continue in it, after the real or pretended cause for capturing or destroying property had notoriously ceased to exist.

Thus the doings of the Shenandoah and the conduct

of her commander and crew, in preying upon and destroying the whaling fleet in the Pacific Ocean, after notice of Lee's surrender, was alike unauthorized and illegal, and may be justly stigmatized as piratical proceedings and conduct, liable to incur condign punishment and certainly deserving it.

In the United States, upon the breaking out or declaration of war, the public vessels are employed by the government to make prize; and their commanders are duly authorized so to do by precise and appropriate instructions issued from the Navy Department.

Theoretically, the prizes thus taken by government vessels belong not to the captors but to the government. Yet by the act of Congress for distribution of prize-money, a mode is provided for practically distributing a portion of it among the officers and crew. This prescribed mode of distribution, however, though long acquiesced in, can hardly be deemed or called fair and equal.

This unequal scale was adopted by the act of April 23, 1800, entitled "an Act for the better government of the Navy of the United States," and has been continued to the present time. Whether at any future period, Congress shall deem a modification of the existing scale expedient and just, it would not be hazardous to claim and suggest, that a basis similar to that of dividing bounties among fishermen, would be far more just, inasmuch as the distributive shares would not be so widely disproportioned among men and officers.

An act of Congress was passed March 23, 1863, whereby it was provided that "in all domestic and foreign wars, the President is authorized to issue commissions, or letters of marque and general reprisal, to

private armed vessels of the United States, and to make regulations for their government, and for the disposal of prizes;" and this act was to continue in force for three years from the time of its passage. It has been since repealed,¹ or has now expired by its own limitations, and no commissions, it is believed, were issued under the act during the American Rebellion.

Sometimes, however, privateers are authorized, during war, to arm themselves and make war upon the enemy's commerce. In such cases, the privateer is commissioned by the government, and should any person, without such commission, make war, he would be liable to be treated as a pirate or robber on the high seas, and incur the prescribed penalties.

During the war of 1812, between the United States and England, numerous vessels of this description were commissioned and in service at sea, and the private armed vessels, thus fitted out from the sea-ports of the United States, became very formidable, and quite effective in damaging and crippling British commerce. But such enterprises must first obtain the sanction of the existing executive government, for the want of which, all so engaged may incur the penalties recognized by the law of nations for such offenses.

On the ocean, however, during the existence of hostile relations between belligerents, all vessels, whether armed or not, have the right to defend themselves against attack; and whenever a commander shall, in self-defense, capture a hostile vessel, he will be fully justified in taking possession of the captured vessel, manning out his prize, and sending her into port for adjudication.

¹ *Vide* U. S. Prize Act, 1864, (Appendix K.)

If a capture be made by a non-commissioned captor, it is made for the government, the captors themselves having only a claim for salvage, not prize money *per se*.

In awarding *quasi* salvage, as a substitute for a distributive share of prize money, prize courts, as a general rule, should exercise a large discretion and award liberally, — thus, at the same time, strictly observing any recognized but arbitrary rule of international law, and doing exact justice to a meritorious captor, as his conduct would be viewed by the local law of his country. The aim and object should be to render the so-called salvage award a precise equivalent for prize money.

Capture of prize may be generally defined as the taking by a belligerent of enemy property on the high seas with an intent to convert and appropriate it to the belligerent's use. It is permissible only in time of war, and if the captured property be notoriously not neutral or hostile, it is subject to confiscation and condemnation as prize of war.

Capture is justifiable for breach of neutrality or trading with the enemy.

Breach of neutrality may be committed: 1. By carrying on or attempting to carry on any contraband trade with the enemy; or, 2. By violation of blockade or attempting so to do.

The first offense against neutrality will occupy but little space, however interesting and inviting may be the discussion of that branch of prize law. All munitions and materials of war are contraband articles; and, as such, are expressly inhibited, and all trade and transportation of them by neutrals to one of two belligerents, engaged in hostilities, strictly interdicted. So is it with

provisions, clothing, necessities, medicines, stores, comforts, or even luxuries, should the supply be short and the want great in an enemy territory.

At this period, by far the most attractive discussion is that of blockade, rendered intensely so by recent events.

By the law of nations, trade (to a certain extent) is permissible between neutrals and belligerents. But this license is restricted by general law, and it may be also by treaties. A neutral engaged in harmless commerce, enjoys unrestricted trade with belligerents. But a neutral otherwise employed, is at any time liable to capture as prize, whether it be while openly carrying on any illegal trade; or undertaking to conduct commercial enterprises in disregard of existing treaties; or in violating an existing and proclaimed or otherwise known blockade; or introducing articles into a belligerent country, with a view to supply a belligerent with inhibited merchandise for his "aid and comfort."

Against all such illegitimate attempts and practices, the law is precise, rigid, and intended to be thoroughly effectual. All belligerent rights are clearly defined and well established, perhaps none more so than the right of blockade. It is as ancient as naval warfare itself; has the highest sanction of nations recognizing the principles of maritime jurisprudence; is deemed essential to national integrity and security; and in Admiralty courts, it is invariably upheld and enforced, in modern times, with the utmost vigor and precision, insomuch that, in its occasional practical application and effects, it is not unfrequently accounted a somewhat severe rule of international law.

Notwithstanding its supposed severity, however, the

good sense of nations has supplied several rules, with which compliance has been deemed an indispensable prerequisite, before judicial condemnation can take place.

There must appear to be: 1st. A blockade existing; 2d, a knowledge of such blockade; 3d, a violation of it, or an attempt to do so.

And all three must appear affirmatively before the judicial mind, in prize courts, can be prepared to determine or even hear the captor's claim.

I. Blockades must be actual and absolute. If a sovereign power impose any interdiction of trade by blockading certain given ports, it is then its duty to enforce such measure; and for this purpose, an adequate force should be employed to prevent either ingress or departure of vessels, hostile or not neutral, from such blockaded ports. This force may consist of war-vessels or shore batteries; but whether of one or the other, or both, the force, wherever and however stationed, on land or sea, must be sufficient to make the blockade effectual. A mere paper blockade is no blockade.

All forcible commercial interdiction must be effective and continuous. But the supreme power only can declare and maintain a blockade. Yet neither the commander of a national vessel or fleet can authentically proclaim the existence of a blockade, unless thereto specially authorized so to do, by his sovereign or the existing government. When, however, a blockade is once duly declared and notified, it is incumbent upon the government to station the requisite naval or other force in the vicinity to effectually enforce it. And unless this be accomplished, much mischief may ensue. Innocent neutrals may be misled by the circulation of false ru-

mors of the removal or abandonment of blockade, and thus individuals may be undesignedly damnified or the national credit for fairness and honor become compromised and disparaged.

The right to blockade is unlimited. Should it become necessary, a blockading belligerent may invest the entire coast of his adversary as well as a single port. And whenever it possesses the power and can command ample resources, an adequate blockading naval force need not be wanting. Recent experience in the United States well illustrates this statement. By the Federal Government both steam and sailing vessels were employed during the American Rebellion, effectually investing thousands of miles of coast, bordering on the Confederate States; so that, though the blockade had been frequently called in question for insufficiency and illegality, it has proved to have been effectual in regard to these States, and by the prize courts has been pronounced legal and effective.

II. Whenever an actual blockade exists, the commercial world is entitled to know its existence, and the blockading belligerent is bound to make the interdiction known.

The formal official mode of making a blockade known, is to promulgate it by proclamation of the sovereign power, or it may be sufficient if it become known to neutrals and others by general notoriety. And it is competent to show notice or notification in either way, and a knowledge so shown is sufficient ground to justify judicial proceeding, even to the extent of judicial condemnation in any case of capture, where intervening claimants raise the question of illegality for want of knowledge of a declared blockade.

And whether the notice given be actual or only constructive, it will be equally effectual, provided it be brought home to the party claiming restitution.

III. Any violation of an established, actual, and legal blockade is followed by the recognized penalty, confiscation; and so also is an attempt at violation by running a blockade.

Whatever defense may be set up, unless the excuse be well founded or the pretense be something more than merely plausible, the penal consequences will attach; and both vessel and cargo may become subject to confiscation, by proper proceedings in recognized prize courts.

The cases in England and the United States exhibit many and varied grounds for pretended excuse and justification; sometimes for neutral vessels, and sometimes of cargoes which are claimed in whole or part to be neutral.

The presence of a portion of the cargo proved to be illegal or contraband, may taint the whole of the residue, and the whole lading, and vessel too, may thus become a fit subject for legal and judicial condemnation, by reason of the misconduct of the master or owner, in openly attempting a violation, or covertly attempting an evasion of an existing and known blockade.

If part of the cargo shall clearly appear to be of a contraband character, and any person shall falsely pretend that an innocent neutral owner of the vessel is also the sole owner of the whole cargo, such a course of conduct may stamp the whole enterprise with illegality, and subject both vessel and cargo to confiscation and condemnation. 2 Ch. Rob. 9, *The Eenrom*; 3 *ibid.* 169, *The Imina*; 2 Gall. 377, *The Betsy and George*; 1 Wheat. 417, *The St. Nicholas*; 3 *ibid.* 236, *The Fortuna*.

The ingenuity of captured neutrals in inventing excuses for attempts to violate blockades has been severely taxed in order to reconcile culpable conduct with innocent intentions. But prize courts furnish a sharp sifting process by which they are enabled to detect and duly discriminate, and while sedulously guarding neutral rights, it is equally their duty to protect belligerent rights; being bound to distinguish and scrutinize alike between sham pretenses and real excuses or legitimate justifications.

On this point the cases of the *Byfield* (Edw. 188), and the *Arthur* (ibid. 20), are suggestive and instructive.

In the *Hurtige Hane* (2 Ch. Rob. 124), the pretense was stress of weather; in the *Fortuna* (5 ibid. 27), it was want of provisions; in the *Spes and Irena* (ibid. 79), it was a foreign minister's misinformation; in the *Adonis* (ibid. 256), it was to learn the coast; in the *Shepherdess* (ibid. 262), it was the master's intoxication; in the *Elizabeth* (Edw. 198), it was the loss of mate, binnacle, etc.; in the *Arthur* (ibid. 202), it was inability to procure a pilot; in the *Mentor* (ibid. 207), it was a forced deviation from the regular course caused by the pursuit of a frigate; in the *Charlotte Christine* (6 Ch. Rob. 101), it was approaching the shore batteries of a port blockaded.

But if these cases present specimens of sham pretenses and unsatisfactory excuses for attempting a breach of blockade, yet there are other reported cases, in which the supposed prizes have been decreed to be restored to neutral claimants; and where restitution has been so decreed, unless the prize court shall certify probable cause, the captors as a general rule are usually condemned in costs. The rule, however, is not universal,

and the court may, at its discretion, allow the captor his costs.

The *Neptunus*, 3 Ch. Rob. 108; The *Ocean*, 3 *ibid.* 297; and The *Potsdam*, 4 *ibid.* 89, are of a class of cases in which the suggested excuses were deemed satisfactory and restitution was decreed, and other cases to the same effect may be found in the Admiralty Reports.

Several periods of history in Europe are noted for the occurrence and occasion of prize questions and decisions in reference to blockade, and its incidents. Subsequent to the appearance of Napoleon Buonaparte in the field of war and politics, the nations of Europe were deeply agitated for twenty or twenty-five years prior to 1815. During this period, collisions and coalitions were perpetually occurring; France and England being the conspicuous, if not the chief actors on the scenes of action, occasionally involving Russia, Prussia, Austria, Spain, Portugal, Sweden, and other lesser States in their struggles. Even Denmark was, in 1801, the object of naval assault or investment. In 1807 Copenhagen was blockaded and bombarded by Lord Cathcart and Admiral Gambier; and her whole fleet of eighteen ships of the line and fifteen frigates captured or destroyed, from a mere suspicion of Denmark's siding with France, and without any known overt act.

The six coalitions against France were in 1792, 1798, 1805-6, 1809, and 1813.

Three years after the outbreak of the French Revolution, and before Napoleon had conspicuously appeared on the stage of action, the first coalition against France was formed in 1792, in which French refugee monarchists, Prussia, Austria, Great Britain, Holland, Russia, and Spain were the allies.

The second coalition was formed 1798, after Nelson had gained the battle of the Nile; and Napoleon, for his good conduct and bravery at the siege of Toulon, was advanced, though but twenty-seven years of age, to the command of the army of Italy; where by his rapid movements and successive victories he soon forced the Austrians to treat at Campo Formo.

The French arms, however, under the Directory lost their wonted prestige. But this political device was in 1799 abolished, and Napoleon becoming First Consul, at once suppressed all local factions, revived the nation's former prestige, put himself at the head of the army, crossed the Alps, gained the battle of Marengo in 1800, made terms of peace in 1801 with Austria and Germany, and with England in 1802 at Amiens; materially extended the territory of France, was elected First Consul for life, and afterward, in 1804, Emperor of France, assuming in 1805 the title of King of Italy.

The third coalition was formed in 1805, by England, Austria, Russia, Sweden, and Naples. Soon Napoleon was again in motion with the French army, defeated the Austrians at Ulm, and at Austerlitz overcame the combined forces of Russia and Austria; compelling the peace of Presburg, and making his brother Joseph king of Naples, and his brother Louis king of Holland.

Having thus annihilated the German Empire by practically subverting its constitution, Napoleon was chosen Protector of the Confederation of the Rhine, reducing the title and dignity of Francis II. from that of Emperor of Germany and King of the Romans, to that of Hereditary Emperor of Austria, and making likewise kings of the Electors of Bavaria, Wurtemberg and Saxony, who had attached themselves to the Confederation.

In this condition of affairs, the same allies entered into a fourth coalition in 1806. But Prussia engaging prematurely, lost the battle at Jena and Auerstadt, thus permitting Napoleon to enter its capital, Berlin, in triumph. Hence was issued November 21, 1806, the famous Berlin decree; whereby Napoleon first inaugurated what is termed his "continental system" for Europe, declaring the British Isles in a state of blockade, and prohibiting all commercial trade and correspondence with them.

To this Great Britain retorted with its orders in council of February and November 1807, prohibiting neutral trade between ports from which the British flag was excluded. Thus was commenced a system of retaliatory measures between the two governments of England and France, in which each denounced the proceedings of the other as outrages and violations of the law of nations. But the declared blockade of the British Isles was further followed up in December 26, 1807, by the Milan decree of the French Emperor, still more severe in its character; by which were declared denationalized all vessels, neutral and others, which submitted to search, tribute, or being carried into port, at England's pleasure, without asserting their national independence by resistance or remonstrance to England's menaced enforcement of tribute, percentage, search, or arrest, at sea or in port.

The fifth coalition was formed April 1809, by Great Britain and Austria.

During this collision of arms and diplomacy in which all Europe became embroiled, and the neutral carrying trade of the United States was seriously crippled and damaged, many prizes were captured and condemned,

and the rights of belligerents and rules of blockade were largely discussed by and before Lord Stowell as judge of the High Court of Admiralty in England. The retaliatory measures thus produced, necessitated a system of licenses from neutral and other ports. In St. Domingo, the political situation was anomalous; some ports open, others closed. The blockade was partially raised in portions of that island, where the French had not a firm footing, especially in those which Christophe and the insurgent blacks had succeeded in getting possession and control. Accordingly these ports were, by the British orders in council, designated as ports not "under the dominion and in the actual control of His Majesty's enemies."

The sixth coalition, by Great Britain, Russia, and Prussia in 1813, was after the Berlin decree was revoked.

The legality of these British orders in council, and French Berlin and Milan decrees, were frequently drawn in question in Admiralty, and whenever sustained, were so sustained solely upon the ground of necessity, or expressly as a part of a system of retaliatory measures and then not by reason of any recognized rule of international law. Indeed, in some of the reported cases in Edwards (especially those of the Fox et al., p. 312, and the Snipe et al., p. 380), it is conceded *arguendo* by Lord Stowell, that the orders in council were a strain upon the standing law of nations, only to be justified as retaliatory measures; and upon retraction of the offensive French decrees, the order should thereupon cease to be operative.

In the case of the Fox (p. 314), Lord Stowell says of the British "orders and instructions:" "I have no hesitation in saying that they would cease to be just if

they ceased to be retaliatory; and they would cease to be retaliatory, from the moment the enemy retracts, in a sincere manner, those measures of his which they were intended to retaliate."

Again (p. 315), "Their establishment was, doubtless, a great and signal departure from the ordinary administration of justice, in the ordinary state of the exercise of public hostility; but was justified by that extraordinary deviation from the common exercise of hostility in the conduct of the enemy."

In these cases of the *Fox* and the *Snipe*, this eminent Admiralty judge exhibited more national zeal and partiality than usual in a magistrate, and his decisions, if correct, have been doubted and controverted by other eminent jurists; such as Kent (vol. i. p. 103), and Duer in his first volume on Insurance (p. 644 *n.*). The latter even insists that his judgment and doctrine in the case of the *Fox* is irreconcilable with his language used in the case of the *Flad Oyen* (1 Ch. Rob. 142). That was the case of an English prize ship, captured by the French; carried to Bergen, Norway, there condemned by a French consul, and, under his decree of condemnation, sold to a Danish merchant, and afterward, on the voyage from Bergen to St. Martin's, was recaptured, January 12, 1798, and proceeded against in the British Admiralty Court as lawful prize. The ostensible owner and purchaser intervened as claimant, and his counsel, Messrs. Arnold and Sewell, insisted upon the legality of his title, if the condemnation and sale were regular. But the court, Sir. W. Scott, held otherwise, declaring the condemnation by a pretended French consular court in a neutral country not legal, and restored the ship to her former British owner, on salvage.

In this opinion, he characterized the "act of the French consul as a licentious attempt to exercise the right of war within the bosom of a neutral country, where no such exercise has ever been authorized."

And as to the appropriate mode of reforming or correcting any irregularity in procuring condemnation as prize, the court said: "The true mode of correcting the irregular practice of a nation is, by protesting against it, and by inducing that country to reform it. It is monstrous to suppose that because one country has been guilty of an irregularity, every other country is let loose from the law of nations, and is at liberty to assume as much as it thinks fit."

Such was the language of the great expositor of British Admiralty and Prize Law in the early part of the present century; and if Mr. Duer's critical comment be well-founded, it would seem that opinions expressed in the case of the *Flad Oyen* are not quite consistent with the decisions given in the cases reported in *Edwards*.

The protracted diplomatic and warlike struggle between the English and French courts to circumvent, overreach, and checkmate each other, precipitated also the people of the two nations, as well as the courts, into a corresponding hostile attitude towards each other. Both parties, judging from their decrees and orders, went to the extreme verge of international propriety, to say the least, in action and denunciation. By the court, Napoleon is referred to as the so-called "ruler of the French," his ministers as the so-called "Duke de Bassano and Duke de Cadore," as will appear in the opinions as reported in the cases in *Edwards*. On the one hand, the French decrees were denounced as "violations of the usage of war, establishing an unprece-

dented system of warfare," while on the other, the British Islands were declared to be in a state of blockade, both by land and sea, in just retaliation "of the barbarous system adopted by England, which assimilates its legislation to that of Algiers."

In a report made to the French Conservative Senate, by the Duke of Bassano, French Minister of Foreign Affairs, it was claimed that the Berlin decree answered the English declaration of 1806, interdicting neutral commerce, and the Milan decree answered the orders of 1807, levying tribute but relaxing the interdiction.

Here it may be useful to extract a portion of that report, stating what was then supposed to be the "obligations of belligerents towards neutral ports." The report is directed to the Emperor, and reads thus:—

"SIRE, — The maritime rights of neutrals as solemnly fixed by the treaty of *Utrecht*, became the *common law* of nations. This law, completely renewed in *all* subsequent treaties, has consecrated the principles which I am going to state.

"The flag covers the merchandise. Enemy's goods, under a neutral flag, are neutral; as neutral property, under an enemy's flag, is considered as belonging to an enemy.

"Contraband articles are the only property which a neutral flag does not cover, and arms and warlike stores alone are contraband.

"All visiting of a neutral vessel by an armed ship can be made by a small number of men only, the armed ship keeping without cannon-shot.

"Every neutral ship may trade from an enemy's port to an enemy's port, and from an enemy's port to a neutral one.

“The only ports excepted are those really blockaded, and ports really blockaded are those invested, besieged, likely to be taken, and into which a merchantman could not enter without danger.

“Such are the reciprocal rights of either party, such are the maxims consecrated by those treaties which form the public law of nations.”

This succinct *résumé* may, at the present day, be partially qualified, for the flag will not invariably exempt merchandise from confiscation as prize. “Free ships make free goods,” is not the received doctrine of modern times, although it was formerly strenuously contended for by the Northern powers. But in that struggle, the naval superiority of Great Britain prevailed, the novel pretensions of those powers were frustrated, and that doctrine now only exists between nations which have recognized it by treaty stipulations.

The French statement of doctrine only is recited here, omitting the denunciatory portion of the Duke of Bassano's Report. The whole may be examined in Edw. Rep., Appendix, p. lxvi. The Report purports to give the rights of neutrals, “as solemnly fixed” by the treaty of Utrecht in 1713.

The blockade, as declared, was hardly maintained by either party. The French could not effectively blockade the British Isles. The English could only realize but small profit from French prizes. The effect of these paper and imaginary interdictions of trade was really to annoy neutrals more than to benefit the belligerents. Both parties were playing a game of diplomacy, and this political game of belligerents was continued, to the great detriment of neutrals, although confessedly irregular, and judicially upheld by necessity alone as retali-

atory measures, which, it was avowed, would, upon retraction of the offensive decrees, instantly cease to be retaliatory, and, thereupon and therefore, cease to be just.

Such was the view taken by the English Prize Court of the Orders in Council, when tested by the law of nations. The form of charging different officials with the responsibility of executing these orders was of this general character, —

“ And the Right Honorable the Lords Commissioners of His Majesty’s Treasury, principal Secretaries of State, Lords Commissioners of the Admiralty, and the *Judges of the High Court of Admiralty* and Courts of Vice-Admiralty, are to take the necessary measures herein as to them shall respectively appertain. W. FAWKENER.”

Such is the form of instructions to which the English Prize Court is bound to conform. Over this court the king in council possesses legislative rights, and has power to issue orders and instructions, which that court is bound to obey and enforce. “The constitution of this court, relatively to the legislative power of the king in council, is analogous to that of the courts of common law, relatively to that of the parliament of this kingdom.” The Fox & others, Edw. 313.

To doubt or deny the wisdom or soundness of the orders prescribed by the Privy Council was, then, deemed to be indecorous. And, therefore, it was, that although “it would not have been within the competency of the court itself to have applied originally such rules” (ibid. p. 315), in other words, it could not so do according to the law of nations; yet the mere adoption of these orders by the Privy Council gave to them controlling force and effect over the court, even if they

were not consonant to the usages, customs, and laws of nations.

The preference, avowed by Sir Wm. Scott in the *Flad Oyen*, 1799, for protest and persuasion as the appropriate mode for correcting the irregular practices of a country, is not exactly compatible with his professed passive obedience and judicial submission to the instructions contained in orders prescribed by a privy council, although those orders may even be in derogation and contravention of the admitted principles of international law, and clearly conflict with, and practically subvert the long usage and standing practice of neutral commercial nations.

The course of Ch. Baron Pollock, in the *Alexandra*, though persistently resisted by Barons Pigott and Channell, but ultimately sustained by Baron Bramwell, is open to similar critical comments.

Recurring to the Queen's royal proclamation of 1861, we find it enjoining upon all her "loving subjects" a strict and impartial neutrality; and they were thereby expressly inhibited from "breaking or endeavoring to break any blockade, lawfully or actually established by or on behalf of either of said contending parties;" and, if guilty of such acts, they were exposed to "the penalties and penal consequences" imposed and decreed by statute and law of nations.

The question was raised in the *Helen* (1 Adm. & Eccl. Rep. 1), whether an agreement to break the blockade of the Confederate States was legal or a municipal offense, and Dr. Lushington (the last, most learned, if not, also, the ablest of English Admiralty judges) declared against the alleged new doctrine in these words: "It appears that principle, authority and usage unite in

calling on me to *reject* the new doctrine — that to carry on trade with a blockaded port is, or ought to be, a municipal offense by the law of nations.”¹

Was, then, Victoria’s proclamation of neutrality nugatory, or were its prohibitions intended to be as obligatory upon the subject as the instructions of orders in council generally were upon the courts?

It is not, then, a novelty for even the most eminent of English magistrates to exhibit not only partiality and predilection, but even a national devotion to British prejudices and errors.

Sir James Mackintosh, in reference to the British orders in council, retaliatory to the French Berlin and Milan decrees, is reported to have said substantially this: that if the sovereign’s instructions conflicted with the law of nations, he should not be prevented from adhering to the principles of international law and disregarding the instructions.

Would it not have been better for Sir Wm. Scott to have recalled the language which he employed in 1779 (1 Ch. Rob. 350, *The Maria*), which his position demanded, and have lifted himself above ministerial dictation and the political influence of official servants of the crown, and planted himself upon the well-known and universally admitted principles and practice of international law, in all causes involving the necessity of adjudicating upon the rights of neutrals as well as belligerents?

With all due deference to so high authority, it is submitted that the judicial reasoning of the court proceeded upon the assumption, that the political administration of Great Britain must be right, and, therefore, the

¹ *Vide ex parte Chavasse, Jur. (N. S.) May 20, 1865.*

Privy Council could not err, and thence deducing this corollary, that it would not be decent to revise its political acts, expecting to discover irregularities requiring the reëxamination of a judicial tribunal for correction or reversal. This reasoning is of that species known as *petitio principii*, confessedly illogical, and indicating an undue deference in a magistrate to an authority not strictly legal, but merely political.

This great magistrate might have appeared still greater in the eyes of posterity had he firmly adhered to his formerly avowed convictions, and said, substantially, as Mackintosh said: if I were right then, I will be right now, or, if I were wrong on a former occasion, I will be right on the present.

Two of the greatest of common law judges, Mansfield and Parsons, materially enhanced their future fame for preëminent virtue, as well as ability, by the traditional declarations said to have been made by the one, that if he were wrong yesterday, he would be right to-day; and by the other, that if he were wrong at the bar, he would be right on the bench. Blind adherence to error, prompted by pride of opinion, is ill-suited to a just judge, and can neither elevate his character or add to his fame.

This digression may serve partially to show that both English ministers and magistrates may be mistaken — are not infallible; and a recent and striking exemplification of this statement may be found in the Queen's premature proclamation of neutrality, and the *crassa negligentia* of the advisers and servants of the crown in not seasonably enforcing its various prohibitions and injunctions.

A grave question has been agitated, as to the escape of Confederate cruisers from English neutral ports; and

whether Englishmen have done "any acts in derogation of their duty, as subjects of a neutral sovereign, in the said contest, or in violation, or in contravention of the law of nations" in promoting or not prohibiting the "fitting out, arming, or equipping any ship or vessel, to be employed as a ship of war, privateer, or transport, by either of the said contending parties?"

And, if so, whether such acts constitute an offense under the statute, the law of nations, or the royal proclamation? and, if not, what immunity, if any, was extended to confiding neutrals by that proclamation?

Diplomatic negotiations have, as yet, resulted in nothing but the Johnson Protocol, or Convention,¹ and, whether that be rejected or ratified, the claims growing out of the ministerial precipitation and negligence, or *incuria*, are still in abeyance, and likely to remain so for future settlement.

But a more pointed reference to this topic may be made under the chapter on neutrality. Should it then be resumed, it may admit of a more extended discussion.

The history of maritime warfare shows that England was seldom a neutral, but generally a belligerent, actively participating as a combatant, either principal or ally. In the wars subsequent to the Treaty of Utrecht in 1713, particularly those of 1744, 1756, 1776, 1793, 1812, and 1854, whether with French, Dutch, Dane, Russian, or American, England was a belligerent, and a declared neutral, temporarily, in 1825, as between the Turk and Greek, and not strictly in 1861, as between the United States and the insurgents in the American Rebellion.

England's declared neutrality in 1825² was, indeed,

¹ Since rejected with much unanimity by the United States Senate.

² *Vide* Proclamation Geo. IV. 1 Hagg 400. Appendix B.

an unfortunate precedent. In 1827 it became converted into an armed intervention, by treaty with France and Russia. This triple alliance was not remiss in discovering its intent; and in the harbor of Navarino, while the combined Turkish and Egyptian fleets were formed in the line of a crescent, devised a mode of provoking a collision, and, in the combat which ensued, the allied naval force proximately annihilated the whole of the combined fleet. And such was the result of the proclaimed neutrality of 1825. The precedent certainly is not favorable.

It is hoped the declared neutrality of 1861 may ultimately terminate more auspiciously. To avert the ill-effects and possible consequences of hasty recognition, administrative remissness, and judicial misconstruction, the manifest predilections of Lord John Russell should be disregarded; his avowed political prejudices disavowed; negotiations entered upon with the high and honorable purpose of mutual and satisfactory adjustment; and the problem, now so seemingly complicated, may be speedily solved by expert *diplomats* in a manner alike creditable to both parties, and conducive to prolonged peace and undisturbed amicable relations.

An approximation only to the pecuniary loss of individuals, whether rich merchants or poor mariners, is practicable; but the damage inflicted upon the State, by a needless sacrifice of precious and valuable lives, through a prolonged warfare, caused by a professed neutral, is inappreciable. Without seasonable and satisfactory reparation to the wounded honor of the nation and its sense of justice, the later precedent may become equally as unfortunate as the former.

With such a history and experience, therefore, the as-

sumption of the attitude of neutrality by England is so novel and unusual, that it is not at all surprising that neither the obligations of belligerents towards neutrals, nor the strict rights of neutrals as against belligerents, were likely to be so well appreciated or definitely understood by English lawyers and statesmen, as they might otherwise have been understood and appreciated by them, had the antecedent history and maritime experience of Great Britain been different.

On the subjects of blockade, capture, contraband, the English, as well as the American authorities, are very numerous; also on licenses, the natural product of the policy of the British navigation laws, and their issue, made more necessary by the French Decrees and British Orders in Council. Although the cases on neutrality may not be so numerous, yet they are quite as precise and decisive.

In England, the late leading case on blockade is reported in the recently obtained second volume of Spinks, 113, *The Franciska*; and, in the United States, the leading decision is reported in 2 Black, 635, *The Prize Cases*.

The former exhibits the English doctrine as held by the Admiralty Court in the time of the Russian Crimean War; the latter presents the American view as taken by the U. S. Supreme Court in reference to the American Rebellion. A synopsis of the points determined by the two different tribunals will be presented for general information.

In the 2 Spinks, the points established seem to be, that blockade is a high act of sovereignty, and cannot be imposed by a commander, unless invested with authority for the purpose. On distant stations he is pre-

sumed to be so invested ; in Europe it may be different. Subsequent adoption by his own government legitimates the act of a commander.

It is necessary, to the due maintenance of a blockade, that ingress and egress cannot take place without imminent risk of capture. The testimony of a commander-in-chief is the best, and sometimes the most conclusive evidence as to the sufficiency of the blockading force. The legality of a blockade is not affected by the distance of the blockading force, which may be at any distance convenient for closing the port blockaded. A blockading squadron would invalidate a blockade by capriciously permitting ingress or egress, and by an unjustifiable absence from the locality.

A blockade having been recently established, neutrals may come out with a cargo laden before the blockade, or in ballast.

Occasional elusion of the blockading force does not invalidate the blockade ; it is violation, but not invalidation.

A blockade *de facto* needs no justification. The subsequent publication of a gazette cannot affect the legality of a blockade *de facto* previously established. Early notification is desirable, but not essential to the validity of a blockade *de facto*.

One belligerent cannot concede to another, nor assume to himself a privilege of commerce prohibited to neutrals. A grant of license, which might have such an effect, would invalidate a blockade.

The acts of a subordinate officer cannot affect the character of a blockade, though an individual claimant might plead such acts as his own special justification.

Notice to neutrals of a blockade *de facto* is indispen-

sably necessary; but whatever brings it credibly to their knowledge, is sufficient. Notoriety precludes neutrals from approaching the port on any pretense whatever. Knowledge of the blockade, and not the mode in which such knowledge was communicated, justifies capture.

Neutrals are bound to make inquiry, and cannot plead ignorance which is willful. Ignorance, for which the neutral government is responsible, is no excuse to the individual.

When the blockade is notorious, and no special ignorance is proved, the ship must be condemned. In the Russian War, the blockades of Riga and the coast of Courland were sufficiently notorious to throw the *onus* of proving his ignorance on the neutral merchant in each case.

The treaties with Sweden of 1661, and with Denmark of 1670, confer some specific privileges upon those countries, and remain unrevoked. Revocation of one treaty by another can only be inferred when the two cannot reasonably coexist.

The interpretation of treaties belongs to the Court of Admiralty, but their variation to the government. The *Franciska*, 2 Spinks, 113.

When there is no conflicting testimony as to the sufficiency of a blockading force, that of the commander-in-chief is conclusive. A blockading officer is not bound to detain every vessel approaching the blockaded port; in some cases he should only warn off.

Efficiency of a blockade must not be judged alone by the numbers which evaded the blockading force. The blockade would be invalidated, if it were proved that the force was unjustifiably absent from its locality, and

the most liberal interpretation should be given to the terms used in declaring a relaxation of the rights of war between belligerents.

Though the grant of licenses has never been held to vitiate a blockade, yet *semble* that such an indiscriminate grant, as might throw a trade into the hands of the power imposing the blockade, would be unjust to neutrals, and might invalidate such blockade.

Unless the blockade be so notorious, that knowledge thereof must have reached those trading to the port, individual warning off is requisite.

A blockade may become so notorious, that knowledge thereof must be presumed, or, at least, so far as to throw the *onus* of proving ignorance upon the neutral.

The practice of prize courts has been to always receive every species of evidence, without being restrained by the municipal law of evidence.

When complete notoriety once exists, all vessels seeking to trade with the blockaded port, must be presumed to be cognizant of the blockade, and warning off is no longer necessary.

Treaties may be merely declaratory of the law of nations, as understood by the contracting parties. A treaty, conferring on one neutral a right to trade with blockaded ports denied to other neutrals, would be inconsistent with the law of nations.

Restrictions, as to blockades, are only justified by necessity, and that necessity applies to all neutrals equally. A belligerent cannot allow to one neutral a privilege to import contraband to the enemy, while he denies it to another neutral.

A general right to go to blockaded ports would be repugnant to the rights of other neutral nations.

It is only under special circumstances allowable to make inquiries of the blockading force. The court requires the clearest and most satisfactory proof of special ignorance of the blockade. *The Union*, 2 Spinks, 161; *vide* also *The Franciska*, Spinks' Prize Causes, 111.

The earlier English authorities often cited on the subject of blockade, are the *Mercurius* (1 Ch. Rob. 80), in which it was decided that a violation of blockade by the master affected the ship, but not the cargo, unless one person was the owner of both ship and cargo, or unless the owner of cargo were cognizant of an intended violation, in which case cargo and ship were alike affected.

Warning on the spot is a sufficient notice of a *de facto* blockade.

Restitution, on the same or different evidence, will not legally bar a second seizure; but a second seizor may be subjected to costs and damages.

The *Frederick Molke* (*ibid.* 86), decides that sailing with cargo from a blockaded port, *primâ facie* subjects the vessel to seizure and condemnation; and, if the cargo were laden after the blockade commenced, then cargo, as well as vessel, is liable.

The *Ringende Jacob* (*ibid.* 89), that unwrought iron is an article *promiscui usûs*; but whether bar iron is unwrought is not clear. There is not an article in nature that comes more exactly under the description of an article of promiscuous use than iron; it is a commodity subservient to the most infinite variety of human uses (p. 92), but it may become a hostile article, and so contraband. If the vessel were going to a port of naval equipment, the article might be applied as a naval store, and so become prohibited as contraband. But that

would be reaching a decision, by inference that iron was "an article absolutely hostile." This position the court declined to assume, and added: "Nor can I agree to another argument that has been advanced, that, because unwrought iron is excepted in some treaties as not contraband, therefore, where no exception is expressed, it is to be considered as contraband. Enumeration takes place in treaties to prevent misunderstanding; it distinguishes what shall be contraband from what shall not; but the exception of particular articles is not to be there understood in the strict sense in which it is sometimes said, "*exceptio confirmat legem*."

This ship was under Swedish colors, carrying iron claimed for Russian merchants, and hemp claimed for a Danish merchant, from Riga to Holland; and it was urged that as the cargo was of a contraband nature, and the ship was employed to carry such cargo, the ship should be condemned; and the court said: "That there are some contraband articles cannot be denied. Hemp, the produce of Russia, exported by a Danish merchant, would be confiscable even under the relaxation, which allows neutrals to export that article only where it is of the growth of their own country; but, to a Dane, hemp is expressly enumerated among the articles of contraband in the Danish treaty; and to say that a Dane might traffic in foreign hemp, whilst he is forbidden to export his own, would be to put a construction on that treaty perfectly nugatory. The hemp must certainly be condemned; but I do not know that, under the present practice of the law of nations, a contraband cargo can affect the ship.

"By the ancient law of Europe, such a consequence

would have ensued; nor can it be said that such a penalty was unjust, or not supported by the analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the courts of Admiralty of this country, and, I believe, of other nations also, a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expenses, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances."

The decision was reserved, however, for further inquiry and information, from Dec. 11, 1798, to Feb. 22, 1799, when the ship was condemned, the master being presumed to have received notice of the blockade.

The *Betsey* (ibid. 93), determined that a commander's declaration of blockade, without actual investment, will not establish a blockade. On distant stations, however, a delegated authority may be presumed to have been conferred upon such commander by his government, and this, upon authority and principle, may be accepted, at the present day, as the better doctrine.

The *Henrick and Maria* (ibid. 146), that "a declaration of a blockade is a high act of sovereignty, and a commander of a king's ship is not to extend it." *Aliter*, if he have either express or implied delegated authority.

In the *Vrouw Judith* (ibid. 152), Sir W. Scott said: "A blockade is just as much violated by a vessel passing outwards as inwards. A blockade is a sort of circumvallation round a place, by which all foreign connection and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the

entire commerce of that place, and a neutral is no more at liberty to assist the traffic of exportation than of importation. The utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule, which this court means to apply, that a neutral ship departing can only take a cargo, *bona fide* purchased and delivered before the commencement of the blockade. If she afterwards takes on board a cargo, it is a fraudulent act, and a violation of the blockade.

“It is certainly necessary that a blockade should be intimated to neutral merchants in some way or other. It may be notified in a public and solemn manner by declaration to foreign governments, and this mode would always be most desirable, although it is sometimes omitted in practice. But it may commence also *de facto* by a blockading force, giving notice on the spot to those who come from a distance, and who may, therefore, be ignorant of the fact. Vessels going in are, in that case, entitled to a notice before they can be justly liable to the consequences of breaking a blockade. But I take it to be quite otherwise with vessels coming out of the port, which is the object of the blockade; there no notice is necessary after the blockade has existed *de facto* for any length of time; the continued fact is itself sufficient notice. It is impossible for those within to be ignorant of the forcible suspension of their commerce. The notoriety of the thing supersedes the necessity of particular notice to each ship.”

In the *Columbia* (ibid. 154), Sir Wm. Scott said: “There is no rule of the law of nations more established than this: that the breach of a blockade subjects the

property so employed to confiscation. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all the books of law, and in all the treaties. Every man knows it; the subjects of all states know it, as it is universally acknowledged by all governments who possess any degree of civil knowledge."

And in this case it was decided, that the actual sailing, with the intention to break a blockade, is a breach of it, and the penal consequences of such breach attach to the property of persons ignorant of the fact, by the conduct of the master, or of their consignee, if intrusted with power over the vessel.

The ship and cargo, belonging to the same person, were accordingly involved in the sentence of condemnation.

In the *Vrow Johanna* (2 Ch. Rob. 109), it was declared to be the duty of a country, notifying a blockade, to notify also its revocation, if revoked. In the absence of any such revocation, the legal presumption is that the blockade still exists. This decision was in July 18, 1799, and grew out of the blockade of Amsterdam.

The *Neptunus* (ibid. 110), was a case where a misrepresentation of a fact by a cruiser was deemed to be an excuse. The validity or efficiency of the blockade of Havre was considered, in 1799, to be impaired, and the prize was restored.

The *Adelaide* (ibid. 111, *n.*) was the case of alleged *bonâ fide* ignorance of the blockade for want of any notification; but the ship was condemned.

The *Juno* (ibid. 116) was the case of a master's innocent misapprehension of the terms of a license to carry cargo into a blockaded port; and the court said (p. 119):

“A ship that has entered previous to the blockade may retire in ballast, or taking a cargo that had been put on board before the blockade. This is the distinction which I have held, and shall hold, till I am corrected by a superior court.”

In the *Weelvaart van Pillaw* (ibid. 128), the alleged offense was escaping a blockading force. On a subsequent capture the ship was held to have been taken *in delicto*, and subject to confiscation.

The ports of the United Provinces were blockaded March 21st, 1799; the same day foreign ministers were notified, and March 26th notice was inserted in the *Gazette*. A Danish ship sailed from Rotterdam, March 28th. The lapse of one week's time was not deemed sufficient to affect the parties with legal knowledge of the blockade, and the ship was restored. The *Jonge Petronella*, 2 Ch. Rob. 131.

The *Calypso* (ibid. 298), was another case of prize, arising under the same blockade; and sailing with part of the cargo taken in after notice, was deemed a breach of the blockade.

Notification of blockade is a communication of its establishment, or declaration by the government of a belligerent to the representatives of foreign courts in a belligerent country, or by ministers of the belligerent country, resident abroad, to the respective governments to which they are accredited.

The main purpose of notification is to impart to neutrals timely knowledge of a declared blockade; and it is sufficient if that knowledge reach them, whether it be obtained from general notoriety, or the sovereign's proclamation, or other official promulgation, if formal and authentic.

Dr. Lushington concurs with Lord Stowell, that a blockade *de facto* may become, by lapse of time and other circumstances, so notorious that knowledge must be generally presumed. In some cases the notoriety may be so great as to amount to a *presumptio juris et de jure*; in others it may only throw the *onus* of proving ignorance on the claimant. But if there be room for reasonable doubt, the subjects of neutral states are entitled to the benefit of it.

Notice or notification, whether these two terms be synonymous or otherwise, are usually pretty well understood, but not so notoriety. What constitutes notoriety is, perhaps, incapable of a precise definition, though an approximation to it is indeed possible by enumeration or description of its constituents.

In 1855, a particular, yet comprehensive judicial exposition of this test and feature in blockade prize causes, was given by Dr. Lushington. As it is the most recent, it may, therefore, be deemed the most authentic English exposition on the subject, especially as that most learned and able of magistrates had all the benefit of his predecessors' experience, and free access to their reported decisions, and made ample use of them. All that was said by Lord Stowell in the *Rolla* (6 Ch. Rob. 367), or elsewhere, was manifestly fresh and familiar to him. He considered that the necessary materials "to form notoriety" were, —

"*First*, A state of circumstances arising out of the blockade itself;

"*Secondly*, Communications, however made, of the blockade having been established; and

"*Thirdly*, All the circumstances peculiar to the case."

1. The continuance for a time, more or less, of a

blockading force off a blockaded port, the prevention of vessels entering or departing, the indorsement upon the papers of vessels turned back, and the fact of capture, must necessarily tend to constitute notoriety ; for these are facts so deeply affecting the interests of the commercial world, that it would be contrary to all human experience to suppose that they are not circulated at least with the ordinary rapidity with which mercantile communications are made.

2. All verbal or written communications made by officers or other persons in authority to persons engaged or likely to be engaged in commercial transactions connected with the blockaded ports, may be comprised under the second head. These will have their weight towards establishing the requisite publicity, according to the clearness with which, and the times when they occurred, and the number and condition of persons who were made cognizant thereof.

3. There must be taken into consideration all the circumstances which may be said to be component parts of the history of the transaction ; for instance, the locality of the places blockaded, the known probability of the blockade being imposed, the facility of communicating the fact of the blockade to all persons accustomed to trade with the port blockaded, and especially due consideration must be given, according to these facts, to the time which has elapsed between the establishment of the blockade and any attempt to trade with that port. Nor must it be forgotten, that the residence of the parties who may embark their property in such commercial undertakings, may require, in justice, to be duly considered ; for it is obvious to all, that intelligence which must become known to countries in the

neighborhood of blockaded ports, may be utterly unknown to the inhabitants of distant states, where all communications of facts must occupy a longer space of time, and in some instances be less likely to take place at all.

When complete notoriety once exists, all vessels seeking to trade with the blockaded port must be presumed to be cognizant of the blockade, and warning off is no longer necessary. Knowledge of the blockade and not the mode in which the knowledge is conveyed, justifies capture.

And the practice of the prize court has ever been to receive every species of evidence, without being restrained by the municipal law of evidence: —

First, because the prize court being not a municipal court, but a court for the administration of *public* law, was not restrained with regard to evidence, by those rules which are applicable to questions of municipal law.

Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence; because this court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding in transactions in which they were interested, proofs recognized by themselves.

Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

Fourthly, because, though a court may receive all, it will form its own judgment according to the circum-

stances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence merely because it does not exclude it.

Lastly, though not least, because as all its judgments may be exposed to the test of an appeal, the superior court may, with greater facility, correct any error arising from too great force being attributed to any species of testimony, than it could remedy an evil arising from exclusion.

This judicial exposition of the principles and practice as applied by the English Prize Court to captures for legal or technical breach of blockade by vessels leaving or attempting to enter ports or places notoriously under blockade, declared or established, contains a summary of the most authentic English doctrine, as promulgated by the great master of Admiralty and Prize in the *Franciska*, Spinks' Prize Cases, p. 136, *et seq.*

Other English authorities, in this connection, should be cited. The earlier and later cases are the more pregnant with the *dicta* and doctrines of prize law, because of the coalition and continental wars between England and her allies with France, at the close of the last and beginning of the present centuries, and the Russian Crimean War in 1854, in which England and France, as the allies of Turkey, carried on hostilities against Russia.

During the former wars and that of the United States with England in 1812, Sir William Scott presided in the British High Court of Admiralty; and during that of 1854, Sir Stephen Lushington presided. These two eminent Admiralty and Prize jurists, in deciding the

cases of capture brought before them, had occasion to explore the whole system and code of prize law, excepting the peculiar points which were raised and settled in the American courts, during the great Rebellion.

It will not, therefore, be inappropriate to give a full view and synopsis of all the English prize cases concerning blockade in the present treatise, in addition to those which have already been referred to. The cases upon blockade reported in the first and second volumes of Christopher Robinson, have been heretofore particularly referred to; those in the four subsequent volumes of that accomplished reporter will hereafter be noted.

The *Juffrow Maria Schroeder* (3 Ch. Rob. 147) was a Prussian vessel, seized for a violation of the Hayre blockade in 1799, and restored by reason of a relaxation of a strict blockade, from the inattention practiced by British cruisers. Sir William Scott (*ibid.* pp. 157, 8) said: "It is in vain for governments to impose blockades if those employed on that service will not enforce them. The inconvenience is very great and spreads far beyond the individual cases; reports are eagerly circulated that the blockade is raised; foreigners take advantage of the information; the property of innocent persons is ensnared, and the honor of our country is involved in the mistake."

The *Neptunus* (*ibid.* 173) raised a question as to the sufficiency of time for notice to Portugal; the *Adelaide* (*ibid.* 28), as to notice to America; the *Ocean* (*ibid.* 297), the same point.

The legal consequences of a blockade must depend on the means of blockade, and on the actual or possible application of them by a blockading force. Neutral

property shipped from a hostile port, after blockade, generally may be presumed to be impressed with the enemy shipper's character, and so confiscable. But this presumption is neither conclusive nor universal. On the contrary, to hold it so, would be applying the rule of law too strictly to innocent neutral merchants.

If orders are sent from neutral ports to blockaded ports, prior to the declaration or establishment of blockade, and those orders are answered by an enemy shipper, after the blockade, but before the neutral merchant may have had time to countermand the orders, it would be rigor and not law to hold the neutral merchant culpable and his goods confiscable. And explanation by letters, dates, papers, and statements derived from credible neutral sources, ought to avail to exonerate the neutral merchant and entitle him to restitution after capture.

But (*ibid.* p. 298) Sir William Scott says: "The representation of the enemy shipper could not have availed to exonerate the neutral merchant, if otherwise liable. Were this to be allowed, it would be in the power of the enemy to put an end to the blockade as soon as he pleased. If the general law is, that egress as well as ingress is prohibited by blockade, the neutral merchant is bound to know it, and if he entertains any doubt, he must satisfy himself by applying to the country imposing the blockade, and not to the party who has an interest in breaking it."

Three things favor the restitution of captured property claimed by neutrals: —

1st. A presumption of innocent neutral intentions as to the blockade.

2d. Proof of fair and not fraudulent conduct on the part of a neutral claimant.

3d. A positive mercantile necessity of his escaping with the purchased merchandise from a closed to an open port, in order to realize the fair result of his traffic as a neutral, though he may excite the suspicions of a vigilant cruiser and expose himself to temporary detention by seizure.

In the *Hurtige Hane* (3 Ch. Rob. 324), persons residing in the kingdom of Morocco, as to blockade, were not considered to be strictly on the same footing as European merchants; but, in some respects, were entitled to a relaxed application of the law of nations.

In 4 Ch. Rob. 63, the *Frau Ilsabe*; *ibid.* 65, the *Stert*; *ibid.* 79, the *Jonge Pieter*; *ibid.* 89, the *Potsdam*, and *ibid.* 93, the *Alexander*, are all cases relating to blockade, and that of the *Jonge Pieter* is quite suggestive.

In 5 Ch. Rob. 27, (the *Fortuna*), the allegation to excuse a breach of blockade by making for a blockaded port was a want of provisions and adverse winds, constituting a case of necessity or distress in the judgment of the master. A pilot had been taken to conduct into the Ems, but owing to the prevalence of strong westerly winds, he was unable to enter there, and was compelled to make for the Weser. The want of provisions is an excuse not to be received on light grounds. It may induce a master to seek a neighboring port, but can hardly compel him to resort exclusively to the blockaded port. To justify this, there should be a strong, invincible, paramount necessity, compelling him to enter the particular port under blockade.

But the allegation as to the westerly winds prevailing for nine consecutive days was deemed to be of a different nature; the court admitted its sufficiency, and restored the ship.

The Hurtige Hane, *supra*; the Christiansburg, 6 Ch. Rob. 376; the Elizabeth, 1 Edw. 198, and the Charlotta, *ibid.* 252, may also be referred to on the subject of distress and necessity.

In the Nossa Senhora da Adjuda (5 Ch. Rob. 52), a neutral Portuguese vessel was seized on a voyage from Rouen to Lisbon for violation of the blockade of Havre. The blockade of this port, which is at the mouth of the River Seine, is practically a closing of all the ports above the entrance to that river, Rouen being one of such ports. Therefore, condemnation would follow the seizure unless good ground for excuse should appear and be proved to the court. Blockade was declared September 6, 1803. Before its commencement, the vessel had gone to Havre, and had been engaged in loading from the 1st to the 29th of September. She sailed from Rouen to Havre October 1st, proceeded on the 19th on her voyage to Lisbon, and was captured by ships cruising off the blockaded port. The master denied that he had received information of the blockade before he left Rouen. And the claim given in was for the ship and part of the cargo by the master, and for the rest of the cargo as being on board a free ship, and therefore protected by the treaty with Portugal of 1654, in which there was a stipulation that free ships made free goods.

But Sir William Scott, perceiving that the cargo was documented in the bills of lading as the property of Portuguese merchants, restored it, and declined to order further proof in the case for the purpose of raising the question of law, as to "whether the privilege of free ships free goods (under treaty) can be construed to extend to the case of exporting enemies' goods from a

blockaded port, even before the ship is affected with a knowledge of the blockade."

Ultimately the free passage of goods not contraband in neutral bottoms and under neutral flags, must be adopted and accepted as part of the law of nations, even if it be not so substantially since the Paris Convention of 1856, and by the numerous treaties of the United States with other states.

The *Spes and Irene* (5 Ch. Rob. 77) was the case of two vessels captured and condemned for violation of the blockade of the Elbe. It appeared that the owner had knowledge of the blockade, wrote to his master informing him of it, and directed him to continue his course till he was warned or turned away. The breach of blockade was complete by the attempt to enter. The true rule is, that after the knowledge of an existing blockade, a neutral may not go to the very station of blockade under pretense of inquiry.

The equity allowed to American vessels during its first war was this: that ships sailing from America before the knowledge of the blockade had reached America, should be entitled to a notice, even at the blockaded port; and that ships sailing afterwards, might sail on a contingent destination even to that port, with the purpose of calling at some British port, or at some neutral port for information; and that they should be allowed the benefit of such a contingent destination to be ascertained and rendered definite by the information which they should receive in Europe. But in no case was it held that they might sail to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. Condemnation was decreed, and on appeal, the decree was affirmed in 1807.

The Adonis (ibid. 256) was the case of a vessel captured while sailing towards Havre, after having been warned by one of the blockading frigates that Havre was under blockade. The master's ignorance of his locality or the French coast was no justification for his heading for that coast after notice. The ship was condemned, and the cargo involved in the same penalty, inasmuch as the master could hardly be presumed to commit such persistent fraud, contrary to the instructions and intention of the owner of the cargo.

The Shepherdess (ibid. 262) was another case of obstinacy and willful perseverance on the part of a master to violate the blockade of Havre, after warning; thereby defeating the effect of a contingent destination as to American vessels. And the owners of the ship being concluded by the conduct of the master, and the interests of the cargo implicated in it also, both ship and cargo were condemned.

The Apollo (ibid. 286) was a case where a master was warned of the blockade of Dieppe by indorsement on his papers. But he persistently hovered round the port, watching a chance to run the blockade, was captured and his vessel condemned; his persistence after notice justifying the condemnation.

The Neutralitet (6 ibid. 34) was a case of false destination, and deviating to the neighborhood of a blockaded port, anchoring near the shore batteries. It was claimed that anchoring in an open road with a design of going in, could not, on principles of law, be deemed a violation of the blockade of the port. But the ship and cargo were condemned, the alleged defense being held unsound.

The General Hamilton (ibid. 61) was a case of pur-

chase in a blockaded port by an American merchant; and by him the vessel was despatched on a voyage from the Seine to New Orleans, but compelled, by stress of weather, to put into an English port, where she was seized. The purchaser intervened as claimant for the property, and also set up that the voyage was at an end. But the court held, that purchase in a blockaded port constituted the illegal act for which the penalty would attach, and that the pretended termination of the voyage did not lawfully operate to defeat the incurred penalty of confiscation. Condemned.

The Christina Margaretha (ibid. 62) was restored, and captor's expenses refused. A blockade *de facto* existed at Cadiz in 1805. Sir J. Ord announced that "neutral ships might sail," thereby relaxing the blockade. Permission to pass the blockading squadron was a remission of all penalty. But a British cruiser in the channel arrested the vessel, though not at the time employed in the blockading service; the result was simple restoration without captor's expenses.

The Triheten (ibid. 65) was released on the ground that the blockade of Cadiz was raised and not reëstablished at the time of capture, by reason of the blockading squadron having been driven off by a superior force. Without proof of resumption, there could be no actual blockade, and consequently no penalty for its breach could lawfully attach.

In the Hoffnung (ibid. 116), it was held that the raising of a blockade by a superior force is a total defeasance of that blockade and its operations, and when removed it should be by notification, before foreign nations could be affected with an obligation of observing it. The mere appearance of another squadron would not restore the

blockade, but that the same measures would be necessary for the recommencement that had been required for the original imposition of it, and that foreign merchants were not bound to act on any presumption that it would be *de facto* resumed.

In the *Vigilantia* (ibid. 122), it was held, that a neutral purchaser of a vessel, after a blockade commenced, cannot sell such vessel in a blockaded port, if such purchase had been originally made of an enemy. Still the court pronounced its opinion with this qualification, that it had already been favorably determined in the *Potsdam* (4 Ch. Rob. 89), that a ship originally neutral and upon which no suspicion of enemy's property could arise, might be transferred by one neutral to another in a blockaded port.

In the *Tutela* (ibid. 177), notoriety is sufficient to affect a master who is admitted to be cognizant of a blockade *de facto*, without warning off by the blockading force.

The *Maria* (ibid. 201) was a case of an apparent evasion of the blockade of the river Weser by previously lightering the goods to the river Jahde, west of the mouth of the Weser; and then shipping the goods to America. But the court remitted the penalty because there had been a special relaxation of the trade to Bremen. Ibid. 204 n., The *Charlotte Sophia*. And in regard to the rivers Elbe, Weser and Ems, on or near each of which were the neutral ports, Hamburg, Bremen and Embden, great difficulty was necessarily encountered by the court in doing precise justice, without trenching upon neutral rights, however a declared blockade of such rivers was enforced.

The *Rolla* (ibid 364) was an alleged violation of the

blockade of Montevideo instituted by Sir Home Popham, the British commander on the South American station in 1806. The case was elaborately argued, and the claimant's objections, though unsustained, will be sufficiently presented by citing the conclusion of Sir Wm. Scott's judgment. "I am of opinion," he said, "therefore, that the blockade existed under competent authority; that it was notified in a credible manner; and that it came to the knowledge of these parties in such a way as must bind them; that no circumstances occurred to invalidate the notice previous to the capture; and that nothing which happened since can have the effect of relieving this ship and cargo from the penalty of condemnation."

The Christiansberg (*ibid.* 376) sailed, in February 1807, with cheese and butter, from Rotterdam, ostensibly for Smyrna, but put into Alicant in distress, as alleged. The outward cargo was there sold, another taken on board, with which she sailed for Copenhagen, and on her passage thither was captured. The excuse of distress was deemed unsatisfactory; and it was held, substantially, that one act of fraudulent evasion of an inhibited port or trade would infect the subsequent part of a voyage, its continuity remaining unbroken, until such infection could be radically and legally purged. *Weelvaart van Pillaw*, 2 Ch. Rob. 128. See also note, p. 382, the *Randers Bye*.

In the *Lencade* (Spinks' Pr. Cases, 222), Dr. Lushington, in 1855, said: "The materials for inquiring into the practice of the Prize Court of Admiralty in England, are not of very great extent. The Reports of *Sir Christopher Robinson*, of *Dr. Edwards*, or *Sir John Dodson*, and *Mr. Acton* (Thomas Harman) are our principal sources

of information. The appeal cases will furnish some further means of knowledge, and so will the records of the court itself; but to examine them requires much time and the expenditure of great labor. After all, as I have already observed, the usage of the court, the every-day practice, can only be known *thoroughly* by those who have had opportunity of observing it daily," and, "very few survive who can speak from their own personal experience."

This recent declaration, so authentic, and emanating from a source which, at the time, might indubitably be deemed the highest living authority, would seem to be conclusive. To go beyond or behind it appears to be superfluous. If it do not absolutely ignore the antecedent, fragmentary, immethodical, and meagre reported cases, it does, at least, imply that, practically, they are of secondary value and importance, in enunciating the principles of prize law, as applicable to the belligerent right of blockade, or embodying the rules of practice and proceeding in prize courts. Undoubtedly, all of value in those earlier cases may be found better expressed and set forth in the later decisions of Scott and Lushington. As matter of curious speculation and learning, it may be agreeable, if not positively useful, for the American student to refer to them for the purpose of noticing the then British view taken of the American Revolution, and the political *status* of American citizens; and of observing also the manner in which Dutch, Danish, Swedish, Hamburg, Prussian, French, Portuguese, Lubec, English, and three American ships (the Dickenson, Hope, and Rebecca) were dealt with and disposed of, between the years 1776 and 1779, by Sir George Hay, as judge of the Admiralty, and by Sir James Marriott as King's

advocate and judge of the same court; and especially to read the arguments of the latter in the *Dickenson* (H. and M. 1) on *droits* in Admiralty, and also in the *Hendrick and Alida* (H. and M. 96) on the transportation of arms and munitions of war by the Dutch to aid the provincial army. Beyond these matters, and the judicial relief and humanity extended to non-abjuring English subjects, escaping, sometimes, with indigo and other property, from the Carolinas, but little of legal value can be attached to those earlier Admiralty Reports of Hay and Marriott.

It may, therefore, be safely assumed and upon such assumption, stated, that if, in this work, there shall be furnished a continued complete synopsis or succinct statement of the confessedly reliable English Reports on blockade, then the "principal sources of information" will have been exhausted; and nothing further will remain to be done, but to add those most important reported cases on blockade, growing out of the Russian war of 1854, in which Dr. Lushington has so conspicuously displayed his perfect familiarity with the earlier authorities, as well as his preëminent judicial ability in prize proceedings and practice generally.

And with this addition, the list of English authorities may be considered as complete; after which, the student's attention will be invited to the American authorities.

In Edwards's Reports, the leading doctrines there recognized were that if a neutral master voluntarily enter a blockaded port, and there, by compulsion, make sale of his neutral cargo to belligerent and hostile purchasers, such compulsory sale will not be deemed sufficient to excuse it; that neutral vessels are not permitted to

proceed to blockaded ports, in order to bring away cargo purchased prior to the blockade ; that a ship may not go into a blockaded port for the purpose of procuring a pilot for another port ; that, although a vessel, driven in by stress of weather, may come out again with her original cargo on board, yet a permit to proceed and enter an interdicted port, given by a British officer, would not be regarded as a legal and sufficient excuse for passing the blockade.

The cases touching this subject in Dr. Edwards's Reports are the Comet, p. 32 ; the Mercurius, *ibid.* 53 ; the Five Gebroeders, *ibid.* 95, which decides that the alteration of a license is a fraudulent act, which would cancel or impliedly revoke its permission ; the Forsigheid, *ibid.* 124 ; the Byfield, *ibid.* 188 ; the Luna, *ibid.* 190 ; the Elizabeth, *ibid.* 198 ; the Arthur, *ibid.* 202 ; the Mentor, *ibid.* 207 ; the Madison, *ibid.* 224 ; the Rapid, *ibid.* 228 ; the Courier, *ibid.* 249 ; the Charlotta, *ibid.* 252 ; the James Cook, *ibid.* 261 ; the Fox et alii, *ibid.* 311, and the Snipe et al. *ibid.* 381 : together with quite a number of cases respecting licenses, from page 327 to page 381.

The Comet (*supra*) was an American vessel, captured on a voyage from New York to Nantes in France, under a special permit of the President of the United States, to leave the States, without incurring the penalties attaching to a violation of the American Embargo. This embargo was established in December, 1807 ; repealed in 1809. The order in council restricting trade with enemy (or French) ports was passed Nov. 11, 1807. The vessel sailed in ballast, to bring away French produce, which American merchants had procured prior to the date of the British restricting order. Under the ac-

cepted relaxation of the rule of blockade, neutrals may sometimes depart with cargo from a blockaded port, but they cannot enter a port under blockade. Sir Wm. Scott conceded the rule to have "been so far relaxed as to permit an egress to ships innocently in the port before the restriction was imposed, and even with cargoes, if previously laden; but in the case of ingress there is not the same reason for indulgence; there can be no surprise upon the parties; and, therefore, nothing short of physical necessity has been admitted as an adequate excuse for making the attempt of entry. Generally, where a neutral ship is proceeding to a blockaded port, it must be supposed that she is going there for the purposes of trade. If she goes in ballast, it cannot be with the intention of being laid up for an indefinite time in a foreign port until the blockade is raised. It is a presumption which this court, acting on reasonable principles, is bound to entertain and apply, that she has no other errand there than to keep alive that commercial intercourse with the interdicted port which it is the object of the blockade to prevent. In some cases, no doubt, the rules of blockade are attended with considerable inconvenience to neutrals in abridging their trade, and it is always much to be lamented when they do; but they are inconveniences which arise necessarily out of a state of war, and what neutrals must submit to, looking as well to the rights of belligerents as to the interest which they themselves derive from their neutrality, and which furnish no small compensation." pp. 32, 33.

The President's permit "can only have been intended to exempt this American vessel from the penalties attaching to the violation of their own embargo, for it

cannot be supposed that a government of a neutral state would assume to itself the power of relaxing a blockade. That right rests in the belligerent alone, and meaning to express myself with all the reverence which is due to the governments of neutral nations, I must observe that it is not to be expected that the belligerent country should trust the preservation of its rights to the vigilance of others. The relaxation must be the act of the belligerent upon a representation made on the part of the neutral state, or under a compact between the two governments, where it has been found to press with undue severity on the commerce of the neutral state."

The ship was condemned; and on appeal to the superior court, the decree of condemnation was affirmed, March 3d, 1810.

The *Mercurius* (*supra*) was a Bremen ship, captured while proceeding from Bordeaux to Bremen with a cargo of brandies, but directed to make for an intermediate port in England to obtain a license therefor. The imputation was a fraudulent breach of the order in council passed January 7th, 1807. The court did not "regard it as a fraudulent continuous voyage;" but, on the contrary, the ship's actual destination as directed was "sufficient proof of an honest intention to come to this country to procure a license, and to act conformably to it when granted," and therefore restored on payment of captor's expenses.

In the *Luna* (*supra*), Sir Wm. Scott, in reference to issued orders in council, said: "It is the duty of the officers of his Majesty's navy to carry them into effect; and although they may be of a nature to require a great deal of attentive consideration, gentlemen of the

navy are called upon to act with promptitude, and to construe them as well as they can, under the circumstances of cases suddenly arising."

Captor's expenses not refused.

The *Arthur* (*supra*) was an American ship, with a valuable cargo, seized for breach of the blockade of the Ems. The fact was not denied that the ship was taken in a port which was blockaded; and, therefore, the whole burden of exonerating himself from the penal consequences was devolved upon the party. He was found in an interdicted place; and he must account for his being in such a situation most satisfactorily. The whole burden being upon him, the party must show that he was led there by some accident which he could not control, or by some want of information which he could not obtain. However innocent his intentions may have been, he must explain his conduct in a way consistent not only with the innocence of himself and of his owner, but he must bring it within those principles which the court has found it necessary to lay down for the protection of this belligerent right of the country, and without which, no blockade can ever be maintained.

Sir Wm. Scott concluded his opinion in these words: "I do not see how it can be more permissible to go up to a blockading squadron to inquire for a pilot, than to procure information relative to the blockade itself. Of the two, it seems less venial; because in that case, the fact of an actual knowledge of the blockade is admitted; in the latter, there is, at least, the possibility of ignorance. I am clearly of opinion that, upon the principles already laid down by this court, and from which, however harshly they may operate in individual

cases, it cannot recede without a total abandonment of belligerent rights respecting blockade, this ship and cargo must be condemned."

The *Mentor* (*supra*) was an American ship from New York, ostensibly bound for St. Sebastian's, a port in Spain not interdicted, or to some other permitted port of that country. She was captured when out of her true course, as was claimed by the captors, and condemnation claimed by reason of such deviation. To give a practical solution to the question raised, *Trinity* Masters were called upon to give their opinion as nautical experts. The experts were clearly of opinion that the *Mentor* was not pursuing her course for St. Sebastian's, and condemnation was decreed: which decree, on appeal to the Lords Commissioners, was affirmed January 26th, 1811.

Another incident in the case was the owner's instructions to the master to avoid speaking British cruisers. Reference to this is made only to show with what avidity a very slight circumstance may be seized upon to vindicate the supposed infallibility of British ministers, and accord to England, as a superior naval power, full and unrestricted belligerent rights, however it may abridge the rights of unoffending neutrals. The conflicting retaliatory orders and decrees of England and France were not only annoying, but quite embarrassing to the neutral merchant. If he conformed to the British orders in council, he would expose his property to confiscation or sequestration under the French decrees. If he sought to avoid unjust tribute, search, or arrest and detention by British cruisers, then it was at the risk of incurring the penalties of capture and contingent condemnation under those very orders in council.

No matter what course the neutral ship might steer, or how innocent her ultimate destination, her owner could only anticipate, on the one hand, confiscation, on the other, sequestration. The carrying trade was doomed, and its total destruction without some relaxation was only a question of time. The pretexts for condemnation were many and various, the excuses few and not complex. Deviations for a pilot, refusing to speak cruisers, avoiding their search or pursuit, were as much constructive violations of blockade as were the proof of false destination, the possession of false papers, fraudulent attempts to enter the port under blockade, or approaching such port, or the force surrounding it for the purpose, on pretext of making inquiry.

Thus, in the case of the *Mentor* (pp. 208-9), Sir Wm. Scott observes that if the directions not to speak British cruisers "are to be taken in their full extent, as authorizing the masters of American ships to fly from British cruisers, it is a practice which, *I venture to say*, will be attended with very great inconvenience to American navigation. It must be understood that every commissioned cruiser has an undoubted right of inquiry, and it is not the arbitrary decrees of the other belligerent that can abrogate it. On strict principle, to defeat that right by evasion might be as penal as to resist it by force, *though it has not been so held in practice*, but certainly it is conduct which is always to be viewed with jealousy, and cannot be set up as an excuse advantageous to the parties in any matter requiring explanation of their conduct.

"But if neutrals are to relieve themselves from the injustice of one belligerent nation by committing a fraud upon the other, they are virtually countenancing

and giving effect to those decrees which have been set up in opposition to the right of search.

"If the act of submitting to search is to subject neutral vessels to confiscation by the enemy, the parties must look to that enemy, whose the injustice is, for redress; but they are not to shelter themselves by committing a fraud upon the undoubted rights of the other country."

Thus it might seem that magistrates and ministers in England were alike sensitive and solicitous to protect the rights of belligerents, when questioned, whatever may ultimately be the prejudice to neutral trade, when jeopardized.

The *Madison* and the *Rapid* (*supra*) were cases relating to the transmission of dispatches by neutral conveyance, and in both cases adjudged to be without offense.

The *Courier* (*supra*) was sailing from Pillau to Colberg, but the master doubting the legality of his destination, applied to the commander of a British cruiser who gave him permission to proceed. But the court held that a commander could not supersede the Order in Council of January 7th, 1807, that the ship was proceeding under an insufficient authority, and, therefore, the ship and cargo were condemned.

The *Charlotta* (*supra*) was an American ship, bound from Boston to Petersburg, and put into the Texel in distress. The *Trinity* Masters were called upon, who reported that the deviation was necessary, that place being the preferable port, owing to the state of the wind, and this being deemed a sufficient justification, both ship and cargo were ultimately restored.

The *Fox et al.* and The *Snipe et al.* (*supra*), were al-

leged cases of violation of the British orders in council, issued in reply to the French Berlin and Milan decrees, in which cases those retaliatory measures were largely considered and discussed by the court. In the former case the validity and legality of the orders were fully discussed; in the latter, the revocation of the decrees was considered. Reference is now made to these authorities, more especially, for the purpose of giving the judicial statement of those singular belligerent orders and decrees by Sir William Scott. Substantially it is, that the Berlin decree was published November 21, 1806, declaring the British Isles in a state of blockade; in retaliation to which the British Government, on January 7 and November 11, 1807, published two orders of blockade: the former prohibiting the trade of neutrals between ports from which the British flag was excluded; the latter imposing a total blockade of those ports. On the 26th December following, the French Government issued an edict, dated Milan, and commonly denominated the Milan Decree, by which a still stronger pressure was imposed upon British commerce and British maritime warfare. On the 26th April, 1809, the retaliatory measure on the part of Great Britain, dated November 11, 1807, was restricted in the extent of its local operations, and the two orders of January 7, 1807, and the restricted order of April 26, 1809, were the orders in force at the time of the decision of the case (July 30, 1812). And the vessel was proceeded against by the British captor upon the restricted order of April 1809, the Snipe having been captured on a voyage to one of the ports to which the British blockades had been restricted.

The Snipe was an American vessel, and the United

States had passed a non-intercourse act in March, 1809, directed against both France and England; which act was accompanied with a legislative declaration, that it should cease to operate against either belligerent which should repeal their respective orders of blockade. The French Foreign Secretary (or, as Sir William Scott says, "the person styled Duc de Cadore,") wrote to the United States Minister at Paris, August 5, 1810, notifying Mr. Armstrong of the revocation of the obnoxious decrees as follows:—

"I am authorized to declare to you, that the decrees of Berlin and Milan are revoked, and that, dating from the first of November, they will cease to possess their effect; it being, however, well understood, that in consequence of this declaration the English shall revoke their orders in council, and *shall renounce those new principles of blockade which they have wished to establish*, or else that the United States, conformably to the act communicated, shall cause their rights to be respected."

And in consequence of the communication of this note, the President of the United States issued, on the 2d of November, a proclamation announcing the revocation of the decrees of Berlin and Milan, being content, as the political head of that government, to accept such note as an authentic and sufficient revocation. Thereupon the non-intercourse act was repealed as against France, but continued as against Great Britain, whose ministry did not deem such revocation sincere or authentic, upon any evidence then furnished, and therefore had declined to withdraw the retaliatory orders.

In the statement of the position of the two countries and the history of their respective decrees and orders in council, Sir William Scott said: "These orders were in-

tended and professed to be retaliatory against France ; without reference to that character they have not, and *would not, have been defended.*"

The great cause of political complaint by neutrals against the British orders in council was, that they were novelties, injuriously affecting, interdicting, and measurably annihilating the neutral carrying trade of the United States, Congress being disposed to repeal its non-intercourse act as to both belligerents, and would also have repealed it as to England as well as France, had the former withdrawn its obnoxious orders, as the latter had repealed its unusual decrees.

The United States was content to accept the notice of repeal as communicated by the French Foreign Minister, and acted upon the faith of such accepted notice. The English ministry and her magistrates would not so accept it, because it was not unconditional, or because the knowledge of it came through a neutral source. And yet, in June 23, 1812, with no additional documentary evidence, the acting sovereign, His Royal Highness the Prince Regent, took different ground and acted accordingly. The decree of Napoleon of April 28, 1811, was made known through the resident American *Chargé des Affaires*. And the Prince Regent was pleased to declare that, "although he cannot consider the tenor of the said instrument *as satisfying the conditions* set forth in the orders of 21st of April last, upon which the said orders were to cease and determine, he is nevertheless disposed, on his part, to take such measures as may tend to reëstablish the intercourse between neutral and belligerent nations upon its accustomed principles."¹

Two things appear in this case as noticeable : —

¹ *Vide* Edw., Appendix, pp. lxxviii. and lxxix.

First. Notice of revocation was satisfactory to the United States government as a neutral state, but not so to the British Court of Admiralty, as a belligerent state, not deeming it authentic and sincere.

Secondly. Ultimately, the British government, upon similar evidence coming through a neutral source, reluctantly acted (as the United States had willingly) and repealed its orders.

Notwithstanding the prolonged delay, official jealousy, and diplomatic distrust of belligerent England toward her adverse belligerent, France, in conforming her repeal to that of her rival, it has ever appeared to be an equivocal interpretation and administration of the law of nations to have confiscated and condemned these American vessels as lawful prize.

The legality of the orders in council, and the authenticity of their revocation, having been fully considered by Sir William Scott in these cases, it seems to be not inappropriate again to refer in this connection to the *Minerva* (1 Hall's Law Journal, 218), for the purpose of giving more fully and precisely what Sir J. Mackintosh said, as to sovereign's instructions which come in conflict with the law of nations.

The *Minerva* was an American ship, captured December 3, 1806, for trading from Batavia to Manilla, which were interdicted "colonies of the enemy" under the instructions of June, 1803. The lawfulness of the capture was asserted upon the ground that her trade was not direct to those colonies from America. Sir James Mackintosh, Vice-Admiralty judge, then said: "Batavia and Manilla were certainly colonies of the enemy, and this vessel was certainly not trading between America and such colonies. But though the officers of His Ma-

jesty's service were bound to obey these instructions, he did not conceive himself, sitting as a judge of prize, in a court whose decisions were to be regulated by the law of nations, as bound and concluded by them. He believed, indeed, that he was the first judge who had ventured to pronounce such a doctrine. In every prize court, in every country, by all writers on the subject, and all administrators of the law, the instructions of the sovereign were regarded as a law to the judge. But he considered the law of nations as paramount to such instructions, and the king, indeed, as having a right to dispense with such law, but not a right to extend it. As far, therefore, as any of His Majesty's instructions were a relaxation of the law of nations in favor of neutrals, he should consider himself bound by them ; but if he saw in such instructions any attempt to extend the law to the prejudice of neutrals, he *should not obey them*, but regulate his decision according to the known and recognized law of nations."

It seems, therefore, to follow logically as a plain proposition of international law, that neither a belligerent state nor sovereign can, at pleasure, lawfully import novel doctrines into the law of nations, at the expense or detriment of neutral nations. To whatever extent such belligerent may carry its belligerent right against the adverse belligerent, it surely would not be competent for it to frame decrees and orders against the accustomed trade of neutrals, capriciously and in derogation of the public law, without incurring the possible hazard of converting all neutrals into belligerents. But, a blockade of ports confessedly hostile, any belligerent may rightfully enforce upon reasonable notification, or after sufficient time shall have elapsed to render a de-

clared or *de facto* blockade a matter of notoriety; and if such investment be efficiently maintained by a naval force stationed for that purpose, and competent to enforce the established blockade, the interdiction may also extend to neutrals and be rightfully enforced against them. Nevertheless, a mere declaration of a blockade on paper, incapable of being strictly maintained or rigorously enforced, cannot be construed to be such an interdiction of trade and navigation as should bind neutrals or command their respect, and ought not, therefore, to expose them to loss, or their ships to the penalty of confiscation.

It may be remarked here, that this entire *imbroglio* between the French and English as belligerents, seems to have been the effect and result of a series of passionate blunders; puerile in conception, resentful in demonstration, and positively abortive in execution. And if blunders in administration are ever criminal, then both of these parties were equally entitled to participate in that criminality, as both had shared alike in the mistake of assuming false positions toward the neutral world, and in derogation of international law. And the political lesson to be derived from this bit of history is, that good faith, sincerity, frankness, forbearance, mutual respect, and honor, should mark the conduct of nations in all their varied intercourse with each other, whether in war or peace. If bad precedents be once set, bad precedents may be followed.

The Elizabeth (1 Acton, 10), was a neutral ship, sailing under the protection of a British general order, and had deviated from her final destination in order to land a passenger. It was decided that such deviation did not subject her to condemnation as prize and this de-

cision was affirmed by the Lords Commissioners, and the captors condemned in costs.

The *Sophia Elizabeth* (ibid. 46) was a vessel taken for breach of the blockade of the rivers Elbe and Weser, and it was claimed that the government relaxation of the blockade in favor of the Hanse towns was applicable to this capture and entitled the claimant to restoration of property. But the Lords held otherwise and the vessel was condemned, thereby affirming a similar decree of the court below in this and two other cases: namely, the *Charlotta Sophia*, and the *Klein Jungen*, ibid. pp. 56, 57.

The *Nancy, Hurd* (ibid: 57), was a vessel restored for alleged breach of the blockade of Martinique. It appeared that the blockading force left on an expedition to Surinam, without leaving behind an adequate force to preserve and maintain the blockade. The withdrawal of the force lifted the blockade, and let in neutrals, as they were led to believe the ports might be entered without incurring any risk. The periodical appearance of a vessel of war in the offing could not be supposed to be a continuation of the blockade, for to constitute a blockade, the intention to close a port should be generally made known to vessels navigating the seas in the vicinity; and the blockaders are bound to keep a sufficient number of vessels on the different stations in such communication with each other as to be able to intercept all vessels attempting to enter the interdicted ports.

The *Robert* (ibid. 62) was the case of a vessel entering a port under a *de facto* blockade. Ignorance of its existence was pleaded to justify, but without avail, and condemnation followed.

The *Nancy, Woodbury* (ibid. 63), was at first restored

by the Vice-Admiralty Court, but the Lords, relying upon the judgment of the commander of the station and by invoking papers to prove the existence of the blockade, reversed the sentence of restoration and held that a single vessel was completely adequate to the service to be performed, and condemned the vessel as prize to the captors. And several other vessels, coming within the same principles, were likewise condemned for breach of blockade, p. 65.

In the *Eagle* (ibid. 65), it was held that the chasing of vessels of doubtful description, in the neighborhood of a port under blockade, did not legally operate as a cessation of blockade.

The *Nordstern* (ibid. 128) presented a question of joint capture, where the principal authorities will be found carefully collected by the late George Minot, Esquire, in Am. Ed. of Eng. Adm. Reports.

The *Little William* (ibid. 141) presented a question of alleged violation of blockade of the Elbe, by approaching to inquire of cruisers, but the master of the captured vessel was held justified by his owner's instructions, and the ship and cargo restored.

The *Dispatch* (ibid. 163) settled a similar principle in regard to the blockade of Bremen.

Die Jungfer Charlotta (ibid. 171) was the case of a continuous voyage. *Vide The Maria*, 5 Ch. Rob. 365.

In the *Hare* (ibid. 252), it was determined that a knowledge of the intent to blockade Cadiz binds a neutral, and the presence of a fleet to blockade renders formal notification unnecessary.

The *Manchester* (2 Acton, 60), said Sir W. Grant, "must be pronounced a clear case of breach of the (Cadiz) blockade inward; the vessel also appears to have broken a blockade formally notified by egress."

The *Success* (1 Dods. 131) was the case of a ship, in part Swedish, and in part British, claimed to be protected against the order of January 7, 1807, by a later order of June 20, 1810; but the claim was not sustained. Sir Wm. Scott (p. 132), said: "It is a known rule of law, that when parties agree to take the flag and pass of another country, they are not permitted, in case any inconvenience should afterwards arise, to aver against the flag and pass to which they have attached themselves, and to claim the benefit of their real character. They are likewise subject to this further inconvenience, that their own real character may be pleaded against them by others. Such is the state of double disadvantage to which persons expose themselves by assuming the flag and pass of a foreign state."

Sweden had declared war, but it had not been answered by a counter declaration on the part of Great Britain. The effect of such unilateral declaration the court declined to determine as unnecessary, and observed:—

"The relative situation of British subjects to Sweden depended upon the order in council whereby countries actually at war, as well as those from which the British flag was excluded, were placed in a state of blockade.

"This measure resorted to must exclude British as well as neutral ships. Any other construction would operate as a gross violation of rights—the effect being to exclude neutrals and permit British to trade without restriction, to ports from which neutrals were excluded. That would be a shameful violation of a belligerent right, thus to convert the blockade into a mere instrument of commercial monopoly.

"Though a contrary mode of proceeding might possi-

bly be attended with advantage, yet it would not be a legitimate advantage, as it must be incompatible with the rights of other countries. These considerations would dispose of the case as far as British interests are concerned."

Nor would the indulgence designed for Swedish ships avail to protect the *Success*. She was not legally a Swedish ship. Her flag and pass did not describe her true character. She was disguised, being a fraction only of a Swedish ship. To be truly such, she must have been totally Swedish, without any alloy of other interests. To permit this would give all other neutrals unqualified "liberty to engage in this course of trade, and the blockade would be entirely at an end; and only such ships as are entirely Swedish, were entitled to the favorable operation of the instructions issued June, 1811." And, therefore, both ship and cargo were condemned.

The *Bennett* (ibid. 175) was captured on her voyage from London to San Lucar. She was owned by British subjects, but sailing under a British license, as to an American ship. This disguise was excused, as it was not assumed for an artifice and fraud to impose upon the British government, but to elude its enemy, the French; and the ship was restored. Sir William Scott said: "It has been the practice of all times to assume disguise for the purpose of imposing upon enemies. The practice is as old as the records of this or any other court. It is not a matter of innovation. European states, when in declared hostility, stand in need of commodities which can only be obtained from countries in possession of their enemies; and ships have at all times been permitted to assume disguise for the purpose of

supplying such necessities. It is no new doctrine," and vessels, under the disguise of neutrals or allies, have thus constantly obtained admission and permission.

In the *Arthur* (*ibid.* 423), the nature and requisites of the blockade imposed by the order of April 26, 1809, were considered. The question arose upon a claim of joint capture, promoted in behalf of the schooner *Paz*, against the gun-brig *Blazer*; and this reference to the case is now made for the purpose of giving the court's version and interpretation of that famous order. Sir W. Scott said: "The blockade imposed by it is applicable to a very great extent of coast (including ports of Italy, France, and Holland to the River Ems), and was never intended to be maintained according to the usual and regular mode of enforcing blockades, by stationing a number of ships and forming, as it were, an arch of circumvallation round the mouth of the prohibited port. Then, if the arch fails in any one part, the blockade itself fails altogether; but this species of blockade, which has arisen out of the violent and unjust conduct of the enemy, was maintained by a ship stationed anywhere in the neighborhood of the coast, or, as in this case, in the river (Ems) itself, observing and preventing every vessel that might endeavor to effect a passage up or down the river."

The Naples Grant (2 Dods. 273) was also a question of joint capture, but involved the discussion and definition of important points touching blockade and its commencement. This grant was the term employed to designate a fund of £150,000 to remunerate the services of the crews of three ships (the *Tremendous*, *Alcmene*, and *Grasshopper*), in watching the movements of several Neapolitan ships of war. The blockade was

instituted by the three British ships under the command of Captain Robert Campbell, as the senior officer. Marshal Murat was, at the time, chief of the Neapolitan government, and Naples was the ally of France. The blockade was rather a blockade of ships than of the port, and established in order to prevent the escape of the ships blockaded, and baffle their ulterior hostile purposes. The grant of £150,000 was paid to the trustees for them to cause a proper and legal distribution of it among the crews, in lieu of prize money, and the question raised was as to the claim and right of the Grasshopper to share jointly with the Tremendous and Alcmena. And for this purpose, the question was submitted to the judge of the High Court of Admiralty for his determination by consent of parties.

It appeared that at the commencement of the investment in the Bay of Naples, all three of the British men-of-war were present. The Grasshopper, however, was not present at the time of the summons, nor at the time of the surrender of the Neapolitan ships of war. The reason of the Grasshopper's absence was, that her commander, Sir Charles Burrard, had been ordered elsewhere by his superior, Captain Robert Campbell. Sir William Scott's decision was that the Grasshopper was entitled to shares; observing that "the summons is usually the conclusion of the business, after the parties have taken their positions, and have made the advances, and have sounded the dispositions of the persons who are the objects of attack; but the blockade or the siege commences long before that time."

The Grasshopper, therefore, comes under the ordinary qualification of prize interest, because she was present at the commencement, and contributed to the operation

of stopping egress of the blockaded ships. Both her coöperation and association at the early stage of the siege, served to intimidate the foe and compel the ultimate surrender of the ships in the port where they were quartering.

In the *Diligentia* (1 Dods. 404), there is no general principle settled defining or regulating blockade by the case, but it is suggestive only to naval commanders as to the propriety of detaining for adjudication as prize any vessel when once seized as such. This was a Danish ship, originally seized by Vice-Admiral Sir Charles Cotton, in the *Tagus*, in 1808, and by him released on the evacuation of Portugal by the French. Admiral Berkely, succeeding to the command of that station, in January, 1809, again seized the vessel and sent her in to England as prize. The question raised was whether the original actual captor was now entitled or the subsequent; and it was determined that the last seizor, after an abandonment, was the only captor.

In the three volumes of Haggard, and those of W. Robinson, there are several cases touching prize agents, booty, and joint capture in the slave trade. But with these exceptions, no other cases involving the discussion of prize interests in general or blockade in particular, are to be found regularly reported until the occurrence of the Russian War.

The preceding cases, therefore, may be said to comprise all the decisions relating to blockade which were pronounced by Lord Stowell, during a highly exciting period of maritime warfare, and to complete the design of this treatise, it now remains to refer more particularly to those questions of blockade growing out of the blockade of Russian ports in 1854-5, and which

were heard and determined by Sir Stephen Lushington, the accomplished English Judge of Admiralty during this latter period ; some of which prize decisions were subsequently reëxamined by the Judicial Committee of the Privy Council, and qualified or reversed.

CASES GROWING OUT OF THE RUSSIAN WAR OF 1854.

THE furnished materials for these decisions were not all accessible in this country at the commencement of this work ; and were only partially to be found in Moore's (P. C.) Reports and Deane on Blockade. But recently, the second volume of Spinks' Eccl. and Adm. Reports, and also a separate volume of Spinks' Prize Cases have reached the United States ; and, at the present date (March, 1869), reference to all these sources of authority is practicable. Nevertheless, the intention early announced¹ is still proposed to be carried out, of inserting in Appendix (H) the points decided in Spinks' second volume and also on Prize Cases.

A few of these decisions relate exclusively to blockade, and may accordingly find an appropriate place in this connection. Hardly any one single topic has been touched upon by Sir Stephen Lushington, which was not formerly, either solemnly or incidentally, considered by Lord Stowell. In this course, the former has travelled almost *pari passu* in the track of the latter magistrate, successively adopting and reverently indorsing the decisions and even the *dicta* of Lord Stowell. With two possible exceptions, the decisions and doctrines of

¹ *Ante*, p. 180.

both jurists either are, or were intended to be identical. One of these exceptional cases related to the blockade designed to be imposed upon inland seas or gulfs, which were upon one side bordered by neutral territory. The other case arises out of what might seem to have been an equivocal decision pronounced by the Privy Council Committee, in the case of the *Ostsee*, reported 9 Moore, 150 ; S. C. 2 Spinks, 170 ; and Spinks' Prize Cases, 174. With these possible exceptions, both Stowell and Lushington are in entire and complete accord ; and there is scarcely a conceivable topic discussed by the one concerning blockade, which has not also been either judicially discussed or decided by the other.

A blockade may be either absolute or qualified ; but whether one or the other, certain duties devolve upon the belligerent who shall declare or impose such blockade ; while certain rights and privileges appertain and accrue to neutrals, who may be thereby affected injuriously. The effect of such interdiction upon the trade of an adverse belligerent is seldom to be taken into account, or seriously considered ; for the object of all blockades is to inflict injury and damage directly upon a belligerent, but only incidentally upon a neutral, *jure belli*. Therefore, in reducing a port, coast, or territory, to the condition and state of an *oppidum obsessum* or *portus clausus*, all proper preliminary forms should be duly observed and conformed to.

Blockades should be duly imposed, formally notified, and effectively maintained. All these ingredients are requisite, and the absence of any one of them may defeat their strict enforcement against neutrals. Such hostile measures of restriction against trade and navigation, once defeated in any particular, may fail entirely,

and cannot be revived but by a process *de novo*, or fresh imposition or declaration. When duly declared and notified, blockades should be kept efficient and continued so without intermission.

The better definition of an effective blockade would seem to be such a beleaguering of a place that all entrance to or exit from the blockaded port would be apprehended to be dangerous. This is briefly the substance of the general rule; although, doubtless, there may be some possible qualifications to this as well as to all other general rules.

Another definition of efficient blockade may be, that where it is not practicable to get in or out of a closed port without the risk of capture, unless it be in a fog, or in the night, or in case of violent winds, or in the absence, temporarily, of the whole or portions of the blockading force, either of which contingencies might enable an intentional violator, clandestinely or fraudulently, to take advantage of such casual relaxation of the restriction.

But these and other subjects, such as capture, condemnation, release, restitution, remuneration, probable cause, costs, and damages, published notice, and official notifications at home and abroad, through foreign envoys, ministers, and other officials, residing in neighboring countries, publication of intention and actual imposition of blockade, distinctions between notified and *de facto* blockades, egress or ingress with or without permission, treaties and their construction and application, constructive, delegated or express authority of a commander to impose a blockade and its validity or legality when so imposed, have all been amply inves-

tigated as may be seen by a substantial statement of them elsewhere.¹

After the peace of 1815, Great Britain was not again called upon to take her accustomed part in any maritime war as a belligerent for nearly forty years; and therefore Dr. Lushington had no occasion to act judicially in prize causes, until the blockade of the Russian ports in the Baltic in 1854, when he appears to have engaged in his judicial labors with his well known aggressive integrity and conscientious vigor and alacrity as a British judge; and in the first prize case, requiring his judicial attention (the *Franciska*), he elaborately explored almost the entire field of the law of prize, as applicable especially to coast and gulf blockades.

In 2 Spinks, there are nine or ten cases of prize, eight of which are peculiarly and almost exclusively blockade cases. The *Franciska*, p. 113; the *Steene Bille*, *ibid.* 159; the *Union*, *ibid.* 161; the *Jeane Marie*, *ibid.* 165; the *Nornen*, *ibid.* 169; the *Ostsee*, *ibid.* 170; the *Ionian Ships*, *ibid.* 212; and the *Leucade*, *ibid.* 228; and the points settled, or general propositions therein established or reaffirmed, have already been stated.²

Two exceptional subjects already alluded to were the feasibility of legally closing inland gulfs at their mouth, (as *Bothnia*), and the more important but novel doctrine as to costs and damages, following as of course in case of restitution, where there is a want of probable cause in cases of capture.

To what extent the Black and White seas and the Baltic or Eastern Sea could be closed by legal blockade, presents a problem difficult of solution, only because neutral territory adjoins portions of the waters of those

¹ *Ante*, pp. 466 *et seq.*

² *Ante*, pp. 485 *et seq.*

seas. To invest the White Sea, thereby blockading the port of Archangel, is mere plain sailing, not likely to embarrass any jurist. To close the Black Sea at its mouth is objectionable, not because that sea itself is shut up, but because, by closing it extrinsically, the Danube as well as the Dnieper and other internal rivers would become effectually sealed up also, and neutrals in Central Europe might thereby be damaged in their river and inland trade and navigation, without realizing any compensation therefor, or affording aid to the belligerent, who may have resorted to the measure with neither the desire nor disposition to inflict injury, *jure belli*, upon neutrals.

To close the Baltic at the Sound or Copenhagen (which would doubtless be the easier and more effective way of cutting off all communication and correspondence with the Russian ports), would obviously trench upon Swedish, Danish, Prussian, and German neutral rights and privileges, to an extent hardly to be tolerated. In any war with Russia, the gulfs of Finland and Riga may be closed without cavil or protest; but not so with the Gulf of Bothnia, which, when attempted, would demand the tacit or stipulated acquiescence of Sweden, as it borders on the western side of its waters. The freedom of neutral trade should be unmolested, and neutral territory remain inviolate.

An analogous case may possibly be referred to in the blockade of Montevideo. The Rolla, 6 Ch. Rob. 371.

Another exceptional case may be illustrated by referring to the equivocal decision in the Ostsee (2 Spinks, 170), where, on appeal, the Judicial Committee of the Privy Council reversed a decree of Dr. Lushington, ordering restitution on the preliminary evidence, with-

out further proof, and without awarding to the claimant any costs and damages. The committee reversed so much of the decree of the Admiralty as refused costs and damages. On examining the opinion of the committee, it will appear that the committee's decision may be looked upon, practically, as a slight specimen of judicial legislation, unsustained by general principle and contrary to former practice; divesting the Judge of Admiralty of all discretionary power over the matter of costs and damages upon the restoration of captured property, without further proof or hearing, and arbitrarily mulcting the captors exclusively upon the claimant's proofs of log, ship's papers, and depositions. And this was a decision purporting to be *stricti juris*; thus introducing a novel rule of practice in prize proceedings, encouraging to claimants but discouraging to captors.

If this determination of the superior and appellate court be sound, and the opinion of Sir T. Pemberton Leigh, in behalf of the Judicial Committee, be clearly and intelligibly expressed, so as not to be misconstrued or mislead, then the inferior courts can readily conform their practice to the novel rule. And, with the present sources of information now accessible to all jurists of insular and continental Europe as well as the United States, no difficulty is likely to be encountered in estimating its value and testing its soundness as law.

The precise effect and character of this overruling decision of the Judicial Committee, in the *Ostsee*, cannot be duly or fully appreciated, without special reference to that case, and the subsequent interpretations put upon that decision in other blockade cases. The case was decided by Dr. Lushington, August 19, 1854, over-

ruled by the Privy Council, February 23, 1855. *Vide* the Ostsee, Spinks' Prize Cases, 174; the Leucade (May 21, 1855), *ibid.* 217; the Fortuna (December 4, 1855), *ibid.* 307; the Aline and Fanny (January 30, 1856), *ibid.* 322; and S. C. on appeal (July 10, 1856), in 10 Moore, P. C. Rep. 491; also *vide* the American case referring to the Ostsee, 2 Sprague, 207, the La Manche.

The Ostsee was a Mecklenburg ship, which sailed from Cronstadt, with wheat, to Elsinore for orders; she was intercepted by the ship of war Dauntless and allowed to proceed May 30; she was again met June 1, by the Alban, detained as prize for breach of blockade, and sent to England for adjudication. On August 1, she was restored with captor's consent and captor's costs allowed. At the time of the seizure, there was in reality no legal blockade established at Cronstadt. The owners appealed from the allowance of captor's costs, and claimed costs and damages. Dr. Lushington said, substantially, that Lord Stowell, from 1798 to 1815, while he presided in this court and administered the law of nations, condemned captors in costs and damages in only three cases — not one in one thousand — without permission to justify by stating the grounds of the capture.

The appeal was heard February 23, 1855, and judgment rendered the 29th of March following, when no ground for condemnation appeared from examining the depositions and ship papers, and damages were awarded.

There are several modes of making up the judgment in case of restitution.

First. Simple restitution with no costs to either party:

Second. Restitution with captor's costs and expenses:
and

Third. Restitution with claimant's costs and damages.

On appeal, the Judicial Committee awarded to the claimants costs and damages, as of course, upon restitution, without further proof.

Subsequently, in the *Leucade*, Dr. Lushington judicially interpreted and applied the doctrine as declared by the Privy Council in the *Ostsee*, critically examining that judgment. And it would seem that any candid consideration of this critical review and commentary upon the overruling decision might demand some qualification, if not a reversal of that decision. If the Judicial Committee can legislate, then, in performing their judicial functions as an appellate court, they may, without obstruction, in prescribing rules of practice, supplant, if not supersede the Parliament itself; if they cannot, in their judicial capacity, legislate, then, as a superior court exercising their ordinary judicial powers and privileges as such, they should be confined within the proper sphere of such magistrates, and be content to declare the law as they find it, and settle the practice of courts according to known precedents and just rules of interpretation.

Generally, judicial tribunals cannot well arrogate to themselves the prerogatives of the legislature and still continue to retain that general respect for their decisions which such tribunals ought ever to command.

The Privy Council, in issuing instructions, act as a *quasi* legislative body, and may, by their acts, bind subordinates and subjects just as if those acts or orders were a portion of the standing and fundamental laws of the land. And this may be taken and deemed to be a type of the theory upon which that representative institution, the Privy Council, is founded and organized.

But the Judicial Committee, in hearing and determin-

ing cases of appeal, are to administer, and not to make laws; they should be restricted to declaring what is, and not devising what ought to be, the practice of the courts under its supervision. The error of attempting to prescribe a new rule of practice in prize proceedings is not only unprecedented, but may be futile and nugatory, as it might be in derogation of the laws of nations. If the new rule be not generally acquiesced in, or is not in accordance with the known usages and customs of nations, or has not been a subject of treaty stipulation, no one can be assured that it will ultimately be adopted and incorporated as part of the international law of the commercial world.

Whether the case of the *Ostsee* presents an instance of judicial conduct and course so questionable, may only be seen by looking at all the authorities. Not only was probable cause a question for the court, formerly, on condemnation as prize, but also, on restitution of captured property; and in either or both cases, the court had discretionary power.

But the fair result of the decision of the Judicial Committee in the *Ostsee* is to establish an imperative, rigorous, rule of practice, whereby costs and damages are made to follow, of course, any decree of restitution merely on claimant's evidence, that is, the proofs derived from the depositions, log, and ship's papers. And from that decision, however critically it may be analyzed, no other rule can justly be evolved. Its novelty in the courts can only be equalled by its harshness upon the captors. Formerly, captors had some legal standing in a prize court; they could be heard and might have a chance to justify or excuse a seizure. But this judgment of the superior court has practically wrested from them

every legal weapon of defense ; they are inhibited from proffering further proof, and not permitted to exonerate themselves by proving or alleging justification or excuse. This is the obvious effect of this decision, else it is meaningless. A rule so unrelenting leaves to the court no discretion.

The earlier American authorities do not warrant such practice ; and at least one of the later cases is in conflict with it. Special reference will be made to two decisions of Judge Peters ; one a case of illegal sale, in 1793 (1 Pet. Ad. 330), *Hollingsworth et al. v. The Betsey* ; the other a case of illegal condemnation, in 1804, *Jolly et al. v. The Neptune*, 2 Pet. Ad. 345.

The *Betsey* was a brigantine, bound from St. Bartholomew's to Amsterdam, owned in the United States, with a neutral cargo on board. She was captured by a French privateer, sent into Philadelphia for adjudication, and, upon claimant's proofs, ordered to be restored. The owners of cargo were neutral Swedish subjects and claimed damage. The captors (by Duponceau) craved hearing on the damage, which was allowed.

The first order was an interlocutory decree, restoring ship and cargo, upon the ground that the seizure was not a capture by one enemy from another. And in reference to this, Judge Peters said : " I do not hereby preclude further investigation and inquiry into any matter or thing herein taken, *quoad hoc*, for granted ; but the whole subject as to fact, law, and jurisdiction, is open for discussion and for the final sentence and decree of the court."

Prima facie, the vessel was American property, the cargo Swedish property.

There was an answer to the claim for damages, a

replication, and decree awarding claimant's costs and damages; but referring it to the clerk and merchants to assess the amounts. These assessors reported as damages for vessel, \$4,277.49, and for cargo, \$2,485.29. This report was ratified and made absolute in the final decree of the court, unless cause were shown in four days.

The other case of the *Neptune* was a case of illegal condemnation, perpetrated by a pretended court, held by a French general (M. de Noailles), on the quarter-deck of another vessel. And Judge Peters said: "I have no hesitation in declaring that, in my opinion, that pretended court was unlawful. It was not warranted by the usage and laws of nations." Rejecting, therefore, all proofs or legal effects, claimed under its allegations or decrees, the court ordered restitution with costs and damages.

In both these American cases, there were claims made, replications filed, and restitution decreed. But in both, the captors were heard, and the court exercised a judicial discretion; though ultimately awarding costs and damages to the claimants. Judge Peters was no ordinary judge of Admiralty or Prize law and practice. In a biographical notice, he is thus spoken of: "As a judge, he possessed powers of a high order, and his decisions on Admiralty law form the groundwork of this branch of jurisprudence. Their principles were not only sanctioned by our own courts, but were simultaneously adopted by Lord Stowell, the distinguished maritime judge of Great Britain."

And in a note to *Jennings v. Carson's Exrs.* (1 Pet. Ad. 5), Judge Peters says of himself, "Having been Register of the colonial Court of Admiralty before our Revolu-

tion, the knowledge of the English arrangement of the court must have been once familiar to me."

The later American case referred to is that of the *La Manche* (*supra*), in which Judge Sprague said: "It has been held that if the case be one for further proof, there is probable cause. But the converse of this is not true, if restitution be ordered without further proof (that is upon the claimant's proofs) it does *not* follow that the sending in was improper." Although the rule for damages, as prescribed in the *Ostsee* by the Privy Council, was pressed upon the attention of Judge Sprague, it is plain that he did not practically regard the case as conclusive authority; but deliberately followed the practice and law of prize as officially prepared in 1753, by the principal law officers of the crown at that period; and which was subsequently adopted in 1794, by Sir William Scott and Sir John Nicholl in their letter to John Jay, and has since been judicially recognized and conformed to in prize proceedings by Scott and Lushington. On the part of the Judicial Committee, it was a bold attempt at innovation in 1855, to alter or deviate from the former practice. If their decision be rightly stated by Dr. Lushington, or be rightly understood by other jurists, then indeed it must be an equivocal if not unsound exposition. Subsequent cases tend to show that the rule of damages as there stated requires explanation or qualification, and so the decision cannot be sound; or, if not clearly stated, then it is equivocal, and cannot be safely followed.

The *Leucade* was the first subsequent case in which the decision of the superior court was reviewed, and the language of the Judicial Committee criticised by Dr. Lushington. The *Fortuna* and *Aline* and *Fanny* followed

after and conformed, with apparent reluctance, to the new rule as interpreted ; but on appeal of this last case, it was voluntarily so explained and qualified by the Judicial Committee as to make it conform to the former practice. The dates and extracts from these several decisions which are subjoined, seem fully to justify the preceding comment.

The Judicial Committee, having referred to the *Maria Schroeder*, 3 Ch. Rob. 152 ; the *Charming Betsey*, 2 Cr. 123 ; the *Triton*, 4 Ch. Rob. 79 ; the *William*, 6 *ibid.* 316 ; the *Elizabeth*, 1 Acton, 13 ; the *Actæon*, 2 Dods. 51 ; and to Story on Prize Practice (Pratt's ed.) ; thence deduce this conclusion : " The result of these authorities is, that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo, affording reasonable ground for belief that one or both, or some part of the cargo, might prove, upon further inquiry, to be lawful prize." Spinks' Prize Cases, 179.

In the *Leucade* (*ibid.* 230), Dr. Lushington said : " This rule I apprehend to be that, in the case of all ships and cargoes brought in for adjudication, if it should appear from the depositions and ship's papers that the seizure was made without probable cause, a condemnation in costs and damages will follow ; or in other words, such decree *shall* be passed, when the depositions and ship's papers do not show probable cause." And then, p. 233, adds, " It appears to me, that to subject the captors to costs and damages, without giving them the opportunity of explanation, would, at least, savor of injustice." And subsequently (*ibid.*) asks : " If, upon claimant's evidence alone, a cruiser would be condemned

in costs and damages, will any man rationally expect a blockade would be adequately enforced ? ”

Again in the *Fortuna* (ibid. 312), Dr. Lushington said : “ The whole question of costs and damages was then (in the time of Lord Stowell) in practice differently treated ; but this circumstance will not justify me in altering the practice of excluding captor’s evidence,” according to the rule prescribed in the *Ostsee* ; and (ibid. 313), adding : “ I may indeed, on this question, have much to learn, and perhaps more to unlearn.”

Again, in the *Aline and Fanny* (ibid. 328), he said : “ These questions were at all times replete with difficulty, and that difficulty is now greatly augmented when the consequences may be, not simple restitution to the claimant, but condemnation of the captors in costs and damages, a consequence which formerly would not have followed.”

Now the Judicial Committee on February 23, 1855 (the *Ostsee*, Spinks’ Prize Cases, 191), had said : “ When once in the opinions of the judge with whom the decision rests, a particular case is brought clearly within a particular rule, it should seem that *his* discretion is at an end.”

But in July, 1856, in the *Aline and Fanny*, *alias* *The Queen v. Hildebrant* (10 Moore’s Pr. C., 501), the same committee said : “ With reference to an observation which we find in the judgment, it may be proper to remark that there does not appear to us to be anything in the decision of the *Ostsee* which ought at all to affect the exercise of the discretion of the court, in directing, or refusing to direct further proof.

“ Whatever the law upon that subject was *before* that decision was pronounced, *such*, in our opinion, *it still remains.*”

The merciless criticism and comment upon this novel point of practice prescribed in the *Ostsee* by the Judicial Committee, their subsequent explanation and qualification, and ultimate substantial reconsideration or retraction of it, are not precisely suited to enhance the respect which ought ever to be accorded to an overruling decision of the superior court; and, therefore, it cannot be deemed presuming to have affirmed that the rule of practice as prescribed in the judgment of the Committee of the Privy Council, was at least equivocal, if not historically and technically unsound.

The comment of Dr. Lushington in *Spinks' Prize Cases*, 335 (the *Aline and Fanny*), was to this effect. "It is true, however, as has been forcibly argued by Her Majesty's advocate, that circumstances have been somewhat changed, and that captors run greater danger of being condemned in costs and damages than they did formerly. But however this may be, and, for aught I say to the contrary, it may be a reason for the Judicial Committee to depart from the authority of the *Haabat*, yet I do not think it is competent for me to adopt such a course. Were the admission of captor's evidence an indisputable corollary to the case of the *Ostsee*, it would be both my duty and inclination to acknowledge it; but I do not think that such a consequence can be fairly predicted to follow from that judgment itself, and from the fearful consequences which, in the opinion of Lord Stowell and myself, would necessarily follow from the alteration of the practice.

"If, therefore, the practice is to be altered in this particular, and if the captor's evidence is to be received, it must be the act of a higher authority than mine, *it must emanate from the Judicial Committee.*"

In this singular collision between the Committee of the Privy Council and the High Court of Admiralty, the latter prevailed, and the former yielded; and the only regret now felt is, that the concession had not been proffered frankly and with unreluctant grace, by an explicit recognition, on the part of the Judicial Committee, of the precise rule of practice claimed to be correct, which was that the reception or rejection of captor's proofs, as to claimant's costs and damages, is now and ever has been a matter of judicial discretion for the judge of the Admiralty Court.

To complete the references to the English blockade cases, notice must be taken of two other cases, the *Franiska* and *Johanna Maria* (Spinks' Prize Cases, 287), also same cases in 10 Moore, 37 and 70, cited as *Northcote v. Douglas*, and *Tottie v. Heathcote*. These were cases of alleged breach of the Baltic blockade in 1854, in which condemnation was decreed in the inferior court, but which decree was not affirmed by the superior court; it being considered that there was not, at the time of the capture, any legal blockade, as Admiral Sir Charles Napier's notice did not conform to the facts proved. The one was a case of ingress, the other a case of egress. And the following points seem to have been then decided substantially: If doubt exists as to the time when a blockade commenced, further proof should be allowed to both parties; a ship cannot be condemned for breach of blockade, unless, at the time of the alleged offense, the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner; that the admiral must be presumed to have carried with him sufficient authority to establish blockades of the Russian ports; that neutrals cannot be

legally excluded from a commerce which is open to belligerents; and if a modified blockade is to be enforced, neutrals have a right to be fully apprised of the nature of such modification; a neutral cannot be obliged to speculate on the probability of the establishment of a legal blockade *de facto*, when he is not permitted to speculate on the chance of its discontinuance; that knowledge of a blockade, being the essence of the offense of breach of blockade, the source of such knowledge is immaterial; and though personal knowledge may be presumed from general notoriety, yet the fact alleged to be known must be one which admits of no reasonable doubt; that inferential notice must be such as would have been legal if given as a particular warning to an individual; wherefore, the notice of a blockade must not be more extensive than the blockade itself; that notoriety, as far as it existed, was to the effect that all the Russian ports in the Baltic were blockaded, which was not the fact; and as the master could have received no other inferential notice, he was legally entitled to disregard that. Accordingly, restitution was ordered in both cases.

The non-publication of the English Prize Reports as to the Baltic blockade, or their non-importation into this country, may possibly be explained by the unfortunate difference of the admiralty and appellate courts as to the rule of practice attempted to be engrafted upon the subsisting prize code and practice. At all events, such reports were not procurable, either in England or her American colonial possessions, during the continuance of the Rebellion, which raged till 1865 in the United States.

The authorities as to costs and damages of claimants,

American and English, are *The La Manche*, *supra* ; *The Charming Betsey*, 2 Cr. 64 ; *Malay v. Shattuck*, 3 *ibid.* 489 ; *United States v. Riddle*, 5 *ibid.* 489 ; *United States v. Locke*, 7 *ibid.* 339 ; *The Mary*, 9 *ibid.* 126 ; *The George*, 1 *Mason*, 24 ; *The Bothnia*, *ibid.* 78 ; *The Apollon*, 9 *Wheat.* 372 ; *The Marianna*, 11 *ibid.* 1 ; *The Nicola Mole cases* ; *The Huldah*, 3 *Ch. Rob.* 235 ; *The Driver*, 5 *ibid.* 145 ; *The Apollo*, 4 *ibid.* 160 ; *The Aotæon*, 2 *Doda* 48 ; *Le Louis*, *ibid.* 210 ; *The John*, *ibid.* 336 ; *The Maria*, 11 *Moore*, P. C. 287 ; and *The Betsey*, and *The Neptune*, *supra*, 2 *Pet. Adm.*

The former decisions by Mr. Justice Story and the United States Supreme Court upon questions of blockade, are not unfamiliar to the profession, as they have long been accessible through Gallison's, Mason's, and Wheaton's Reports. The general doctrines there found are not unlike those of Sir William Scott in England as to closing ports ; interdicting commerce of neutrals, citizens, or allies by blockade or embargo ; instituting, notifying, and maintaining blockade ; capturing of property as prize, sending it in for condemnation or restitution by proper prize tribunals ; waiving of belligerent rights in favor of neutrals, but parting with, extending, or suspending none of the law of nations to the injury of neutrals ; subjecting claimants to costs and expenses, and captors to costs and damages upon restitution.

BLOCKADE CASES DURING THE AMERICAN REBELLION.

BUT the American Rebellion presented novel questions touching blockade, of a political, legal, and partially diplomatic character. All discussion of questions

of the latter description will be deferred until the general subject of neutrality shall be considered ; while the questions of a political character will require no discussion except incidentally. But the novelty of the legal questions seem to demand a more ample treatment, inasmuch as they involve a consideration of the acts of the executive government. These acts first appeared in the form of instructions, and which were rendered necessary by the magnitude of an insurrection which so suddenly threatened the integrity of the nation itself. They were subsequently adopted and ratified by the legislature as having been demanded by an exigency, certainly unusual, if not unprecedented in the history of republican government.

Certain States, under certain unlawful acts or ordinances of pretended popular conventions, and by virtue of a pretended right of secession, withdrew from the American Union and arrayed themselves in open revolt and revolution against the Federal Government. The pretext for this insurrectionary movement was trivial, when compared with the magnitude of its criminality, folly, or blunder.

By a recent popular election, Abraham Lincoln had been chosen to serve as President of the United States of America for four years from the 4th of March, 1861. Thereupon, the revolt began, and a conflict of arms soon ensued. The first proclamation of blockade was issued April 19, 1861, and applied to seven States ; and this was supplemented by another of April 27th, applying to two other States. The time for the departure of neutral vessels from these blockaded ports was limited to fifteen days ; and instructions for notice and warning, of a general character, but not so precise as is de-

sirable at the first outbreak of war, were at the same time issued. The heads of the departments were not then experienced in their official duties, or sufficiently familiar with the precise preliminary forms of instituting and imposing a blockade; and hence possibly there may have occurred some slight defect in the authentic proceedings, rendering them in part equivocal; as did Sir Charles Napier's defective notification wholly invalidate the Russian blockade in the Baltic in 1854.

However, the imposition, notification, and maintenance of the American blockade seems, by the decisions, to have been legal and complete. The coasts of the Confederate States to be blockaded, were several thousand miles in extent. Nevertheless, very shortly after the first formal notice had been promulgated, an entire investment of the blockaded States had been instituted, so that neither ingress or egress was practicable without actual danger of capture, or a constant apprehension of it, on the part of the blockade runners, plying their vocation from England or elsewhere, and venturing, for gain, to attempt to break the blockade of the nine States invested.

The cases of this description, which have been judicially decided in the District and Supreme courts, are very numerous. They may be found reported in 2 Sprague's Decisions, Blatchford's Prize Cases, and the U. S. Reports by Black and Wallace, and some few newspaper reports of cases not yet collected.

In the Prize Cases (2 Black, 635), may be found the principal legal propositions established in the American courts. The cases heard on appeal, and decided in 1862 by the United States Supreme Court were the *Amy Warwick*, *Cranshaw*, *Hiawatha*, and *Brilliant*. The custom-

any legal objections on prize hearings, were made and argued, as to the general legality of the blockade, of its notification and maintenance, and even of the legal authority to impose it. But all were well settled; and the prevalent doctrine to be gathered therefrom may be condensed in the general legal proposition following:—

In actual war, whether domestic or foreign, that is technically enemy property, the use of which may ultimately become available to one belligerent, by reason of the domicile or residence of its owner being within the territory under the actual or military control of such belligerent: and such property, when seized, is liable to confiscation by the other belligerent as prize of war, no matter what may have been the political sympathies, or proclivities, or *status* of such owner, whether friendly or hostile, or whether the residence within the hostile territory may have been voluntary or compulsory. In such case, the hostile character of the property is to be ascertained by the same *criteria*; whether the war, in which the belligerents were engaged, may have been a foreign war or domestic insurrection.

Applying this general statement of the doctrine, it follows as an indisputable corollary:—

First, that if the owner be himself hostile, then his property is confiscable; as, should it reach the hostile territory, it would then contribute materially to encourage and enforce hostile operations, by the owner's own voluntary act:

Secondly, if the owner be friendly, then his property, on reaching the hostile destination or territory, might be forcibly seized by the military or supreme *de facto*

power, to be used for hostile purposes, with or without the owner's consent.

So that, in either case, if permitted to pass and ultimately reach its destined port, the property would furnish material aid and comfort to the enemy; wherefore, *in transitu*, it is legally seizable, and would be, *jure belli*, confiscable. And this view must have been deemed generally applicable to all residents within the Confederate States, without pronouncing them alien enemies.

Nevertheless, the proclaimed blockade of the President did not preclude neutrals from controverting its legality, or insisting upon their right to knowledge of an intention to impose a blockade, or notice of its imposition when established.

If, however, neutrals were furnished with such knowledge or notice, then, in their capacity as neutrals, they were bound to respect the exercised belligerent right of blockade, when once resorted to by a belligerent.

Whenever, therefore, the regular course of justice in the courts is found to have been obstructed or suspended by revolt, rebellion, or insurrection, a civil war may be prosecuted either by the sovereign or executive authority against the insurgents, just as if they were foreign invaders.

Wherefore, as against the rebellious States, the same rights and powers accrued and pertained to the executive government of the United States, as if the insurrection were a national or foreign war. The preliminary proceedings of the President authorized and justified the subsequent proceedings under the warlike measure of blockade; and, though not aliens, the residents in the revolted Confederate States were subject to be dealt with and treated as enemies.

The proclamation of blockade allowed fifteen days grace in favor of neutral vessels in blockaded ports to take their departure, together with so much of cargo as had been previously laden. And, upon an alleged breach of blockade by egress, the legal presumption is, that notice will reach all neutral vessels lying in a blockaded port at the time when the blockade commenced. Upon an attempted breach of blockade by ingress, prior endorsement of warning upon a ship's register is not a prerequisite in order to render a capture lawful prize.

In the Prize Cases (2 Black, 687), the legal consequences resulting from a state of war were said by Mr. Justice Nelson to be well understood. His views were substantially that, on the occurrence of war, people of two countries at once become enemies; all intercourse, commercial or other, between them, becomes unlawful; contracts existing at its commencement are suspended; contracts made during its continuance are void; insurance of enemy property, drawing bills of exchange, making purchases in enemies' country, or remission of bills or money to it, are illegal and void; partnerships of citizens or subjects are dissolved; and the interdiction of trade and commerce, direct or indirect, is absolute and complete by mere force of war itself. Property, on land or sea, is subject to capture and confiscation, with certain reservations enumerated in 8 Cr. 110, *Brown v. United States*; all treaties between belligerents are annulled; letters of marque may be granted; prize law, as recognized, comes into full operation; and the mutual relations of neutral states are changed, thus necessitating the declaration of war by the supreme or sovereign power of the state or nation.

Other authorities expounding American Prize Law and its application to captures for breach or attempted breach of blockade, may be here cited ; as *The Springbok*, 1 Wall. 1 ; *The Peterhoff*, *ibid.* 28 ; *United States v. Weed*, *ibid.* 62 ; *The Gray Jacket*, *ibid.* 342 ; *The William Baggalry*, *ibid.* 377 ; *The Sir William Peele*, *ibid.* 517 ; *The Sally Magee*, 3 *ibid.* 541 ; *The Thompson*, *ibid.* 155.

In the *Revere* (2 Spr. 107), the political *status* of the United States in relation to the revolted States was judicially defined. The former had against the latter both sovereign and belligerent rights : by sovereign, it might interdict all commerce in the insurgent States ; by their belligerent right, the United States might establish the blockade. A continued misrepresentation of a voyage afforded cause sufficient for condemnation, and those only were entitled to warning who were ignorant of the President's Proclamation of April 19, 1861.

In the *James Andrews* (*ibid.* 121), the preparatory evidence showed a clear case of enemy property ; but in such case, when, after further proof, restitution shall be decreed, it will, in prize, be on terms of costs and expenses ; but *aliter*, in an instance suit.

In the *Cuba* (*ibid.* 168), August, 1862, it was held, that the prize documents should not be inspected before the completion of the preparatory evidence ; and that a vessel documented as neutral, but with false log and other papers, must be condemned as enemy property, for attempted breach of blockade.

In the *Lilla* (*ibid.* 177, s. c., L. Rep. Dec. 1862, p. 81), the court held that capture in neutral waters must be controverted, if at all, by the neutral nation whose rights

have been infringed ; and not by a private person, or even by a consul ; also that the portion of a neutral owner, who shall claim another portion of the captured property belonging to an enemy, for the purpose of deceiving the court, will be condemned as a penalty for the fraudulent conduct of such neutral owner.

In the *Aries* (ibid. 198), the court held that, on a breach of blockade, not only were the owners of the vessel bound by the master's act, but that the owners of the cargo also were so bound, with few exceptions, and those carefully guarded.

In the *Victory* (ibid. 226), it was held, that vessels picking up goods thrown overboard during a chase, were entitled to such goods as captors, and not as salvors ; in *680 Pieces of Merchandise*, (ibid. 233,) held that the United States district courts have jurisdiction over enemy's property found on a wharf, recently water-borne, and there captured by boats from a vessel of war.

In the *Wando* (L. Rep. May, 1866, p. 391), Judge Lowell (successor to Judge Sprague) condemned a shipmaster's money, though it was not intended for trade.

The *Island Belle* was condemned by Judge Cadwallader, as a hostile ship, with hostile cargo. *Vide* L. Rep. March, 1864, p. 263.

For other American decisions, reference must be made generally to Blatchford's *Prize Cases*, where will be found a full collection of those heard and determined in the Southern District for New York.

With the preceding synopsis of the more recent authorities on blockade, the general plan of this treatise will be accomplished without any further particular

reference (save a single exception) to the decisions collected and published in 2 Sprague, Blatchford, Black, and Wallace's Reports; which Reports are now accessible to the profession generally. The single exception is the case of the *Stephen Hart* (formerly the *Tamulipas* of New Orleans), Blatchford's Prize Cases, 400; particular reference is now made to this case for the special purpose of fully illustrating the general mode and manner of the revolted States, aided by their foreign unneutral friends, if not allies, in running the blockade, in pretended neutral bottoms, from a neutral base of operations; and starting thence with false papers and on a fictitious destination, ostensibly to an intermediate stopping port for transshipment, for the purpose of rendering the expedition apparently, or in part, innocent. But these ill-contrived disguises to impose upon a prize court, Judge Betts stripped off; and neither double destination, consignment to an intermediate port before proceeding to the contingent destination, nor flying a neutral flag, either deceived the blockading cruisers or misled the court; but it was judicially pronounced that neutral bottoms afforded no protection to contraband cargoes; that a fictitious destination was not vindicated by an intermediate transshipment; that a voyage in part wrong was wholly so; that articles which were enemy property at the inception of an enterprise, were the same at the time of capture, and that owners of both cargo and vessel, if laden with contraband goods, were presumed to be connusant of an intention to enter some enemy port, by breaking the blockade if possible; and without repelling this presumption of law, by purging themselves of such unneutral or hostile intent, they could not fairly claim the restitution of goods designed to aid and comfort an adverse belligerent.

The *Stephen Hart* sailed from London, November 19, 1864, bound ostensibly for Cardenas, Cuba, laden with powder, arms, munitions, uniforms, and cloth for uniforms, with 90,000 buttons marked *C. S. A.*, and was captured by the United States steamer *Supply*, some 25 or 30 miles from Key West, and sent to New York for adjudication. The entire cargo was appraised at \$238,945.37. One Major or Captain Hughes appears to have been the active Confederate agent in procuring and shipping this cargo, which purported to be consigned to a Major Charles J. Helm at Cardenas. By intercepted letters, Col. J. Gorgas, as chief of ordnance, seems to have been connected with the general business, as in his contract with Ch. H. Reid for running five fast steamers, Major Caleb Huse is referred to by name. These three Confederate officers or agents were Josias Gorgas (of Penn.) who was at West Point of the class of 1841; Charles J. Helm (of Ky.) was an aid of Gen. Wool in the Mexican War, 1848; and Caleb Huse was educated at West Point in the class of 1851; and notwithstanding their presumed antecedents, all seem to have been devotedly engaged in procuring, and introducing into the blockaded ports of the revolted States, war materials of every description for the purpose of prolonging the civil war and destroying Union soldiers.

The intercepted letters and agreement referred to were published in the "Boston Daily Advertiser" of November 17, 1863.

1st. A letter dated at London, September 16, 1863, from Edgar P. Stringer to J. M. Mason, inquiring as to Major Huse's present authority, as Stringer had "learned that by a recent order of the War Department, Major Huse's authority was now limited to the supply

of ordnance stores, or in other words to contraband of war, and these to be sent forward by government vessels."

2d. A letter from J. M. Mason in reply, dated Sept. 19, 1863.

3d. The agreement of J. Gorgas with Charles H. Reid to run a line of five steamers from England, *via* St. George's, Bermuda, and Nassau, N. P., to Wilmington, N. C., and Charleston, S. C., as Confederate ports; but no contraband, and referring to Major Caleb Huse for "receipt of notification."

Other ports, beside those already named, were resorted to, as Matamoras, Galveston, New Orleans, Mobile, Savannah, and Beaufort, to carry on this business of blockade running, wherever ingress was feasible, or whenever escape from the blockading force was probable.

But the voyage of the *Stephen Hart*, though purporting to be consigned to an intermediate port, was a continuous voyage, in fact, from England to an ulterior destination in some port of the Southern States. The pretended stopping-port was a mere blind to deceive United States cruisers or mislead a prize court; but broke not the legal continuity of the voyage. The contingent destination was her only destination. At Cardenas, Confederate buttons with their special marks and device, could command no price, but for reshipping or transhipping. Indeed, this voyage was as open in its inception and partial prosecution, as it would have been in its ultimate termination had it been successful. The bungling attempts of Confederate agents at disguise or concealment, so far from mitigating, only aggravated the attempted fraud. The buttons, arms, powder, mu-

nitions, agent's residence, 71 Jermyn Street, London, all tended to render the fraud too patent to impose upon any court. The result was a decree of condemnation by Judge Betts, which judgment, on appeal to the United States Supreme Court, was affirmed.

This case well illustrates the mode, manner, means, and agency, resorted to by those in revolt, to run the United States blockade of its Southern coasts. Starting and operating from a port of a neutral nation, whose sovereign in good faith, it may be presumed, proclaimed a strict neutrality as early as May 13, 1861, as she did subsequently, on the following 6th August, express in her speech to Parliament her determination to preserve strict neutrality, as a government, between the belligerents.

The Stephen Hart presents, therefore, a fair specimen of blockade running from English neutral ports. *Ex uno omnia disces.*



JOINT OR CONSTRUCTIVE CAPTURE.

UPON the subject of joint capture, the usual English authorities referred to are, the *Mars*, 1760, by the Lords; the *Vryheid*, 2 Ch. Rob. 22 (1799); the *Forsigheid*, 3 *ibid.* 315; the *Harmonie*, *ibid.* 318; the *Genereux*, Lords (1803), S. C. Edw. 9-16; the *Guillaume Tell*, Edw. 6-16 (1808); the *Nordstern*, 1 Acton, 140; *Le Bon Aventure*, *ibid.* 239; the *Nostra Signora de los Dolores*, *ibid.* 262; the *Empress*, 1 Doda. 368 (1814); the *Financier*, *ibid.* 67; the *Le Nieman*, *ibid.* 16; the *Arthur*, *ibid.* 426; the *L'Etoile*, 2 Doda. 107; the *Naples Grant*, *ibid.* 277; the *La Furieuse*, Stewart (Nova Scotia)

179; and by these decisions, it will appear that the claim of joint capture is founded on coöperation; formerly within sight, but now within sight or signal distance. Dr. Lushington, in the most recent case on booty, the *Banda and Kirwee Booty* (1 Eccl. & Adm. p. 142), sums up the decisions thus: "The result of these prize decisions seems to me to be as follows: they declare actual capture to be the rule, joint capture the exception, admissible only in certain cases.

"They lay down the principle which underlies all cases of joint capture, namely, encouragement to the friend, intimidation to the foe.

"They exhibit two modes in which this principle operates, association and coöperation.

"Lastly, they enforce the necessity, for the sake of the principle itself, of assigning some limits to what shall constitute coöperation."

Until this exposition (in 1866) by Dr. Lushington, of the *rationale* of joint capture, there had been not a little of fluctuation and uncertainty in the application by legal tribunals of the rules intended to govern and settle asserted claims of joint capture; and a professional repugnance to acquiesce in the principles enunciated in some of the judicial decisions. But the foregoing statement, by so consummate a master of both Admiralty and Prize law and practice, is at once clear, philosophical, and logical; and, although it was made incidentally, in pronouncing judgment in a case of booty, and not of prize, this authentic and authoritative exposition is none the less valuable as a legal *dictum* or definition.

In December, 1863, Judge Sprague, in the *Cherokee*, (2 Spr. 235,) had occasion to review the English authorities as to the doctrine of constructive capture, and to

settle the question as to who were joint captors while coöperating in a blockade; and upon a review of those cases, and in the course of his discussion of the doctrines generally, he observed substantially, that it appeared that the judicial doctrine of constructive capture by association had not been uniform, well defined, or well settled. It had encountered the decided disapprobation of the profession, and courts had not unfrequently indicated that it was not satisfactory to themselves, and it seemed finally to have been discarded by royal proclamation. It was by no means commended to our understanding, as founded on sound principles of interpretation.

In the iron-clad ram *Atalanta* (2 *ibid.* 251), decided in January, 1864, the degree or kind of coöperation necessary to constitute a vessel "one making the capture," was explained and defined.

Formerly, joint capture was confined to cases of actual capture. This was in 1799. But, in order to preserve harmony in the British navy, it was subsequently extended to cases of constructive assistance; and the being in sight became the principal criterion. This test, however, would be unavailing, were the general presumption of intimidation and encouragement proceeding from sight to be rebutted. On this presumption of encouraging a friend, or intimidating a foe, the principle of constructive assistance is legally founded. Even joint cruising, without being in sight, will not entitle a party claimant to share as joint captor, and a prevalent indisposition in the courts to extend the construction may be safely assumed. In the *San Joseph* (Lords, May 4, 1784), however, the whole fleet were permitted to share in a capture made by a detached cruiser,

although none others were in sight. This was, doubtless, upon the presumed ground of association, whereby each cruiser may have been supposed to participate in the common or main design of the enterprise; that is, capture of enemy property in a given locality.

The *Aries*, 2 Spr. 262; the *St. John*, *ibid.* 266; and the *Ella* and *Anna*, *ibid.* 267, were all cases relating to signal distance; it appearing, upon the proofs, that Coston's night signals were not legible at eight miles distance. These cases were heard and determined in 1864.

The test of signal distance was frequently applied during the civil war; and its application became a necessary ingredient in several blockade cases, in the same way that sight was formerly a recognized test, before steamers had measurably superseded sailing vessels of war.

RIGHT OF APPROACH, VISITATION, SEARCH, AND DETENTION.

THIS right, however exercised, is a belligerent right, resorted to only in war. In time of peace, it is a dormant power, and cannot be evoked but by mutual consent, or some treaty stipulation. It is the offspring of necessity, produced to preserve and protect belligerents in their war-rights, against the bad faith or other delinquencies of neutrals. The superior naval power of Great Britain has enabled that government to define this right for itself exclusively heretofore, and to exercise it, at times, quite offensively, though it may have been possibly in accordance with the preconceived legal and political notions of its magistrates or ministers. The English doctrine has been often renounced and resisted; sometimes reluctantly accepted; but never cordially acquiesced in.

In the *Maria*, 1 Ch. Rob. 340 (June 11, 1799), and the *Elsabe*, 4 *ibid.* 408 (November 28, 1803), the British pretensions as to the right of search are fully stated by Sir William Scott, in a form unacceptable to neutral nations certainly, and with features offensive probably to all commercial states but England itself.

Between Russia and England, there was a conflict of claims in this respect as early as 1780; when the government of the former denounced and defied the pretensions of the latter. During the American Revolutionary War, the Baltic Powers combined, and Denmark, Sweden, Russia and Prussia confederated to resist England, and uphold the doctrine, that "free ships make free goods;" which doctrine (now more in vogue than formerly), should it ever be universally acceded to, would bring about the millennium in maritime warfare. In such an event, the exemption of neutral carriers and cargoes from capture would be complete, and the immunity of private property from maritime spoliation, as proposed by Mr. Marcy, in behalf of the United States, to the Paris Convention, would materially modify modern maritime warfare. It would then cease to be prosecuted as a war upon individuals; but become rather (as it should be) a war between two commercial states, whose governments must fight it out between each other, according to their respective resources and ability, with sailing or steam vessels, screws or paddle-wheels, iron-clads, rams, or monitors.

Prior to 1812, France and England struggled desperately for their respective theories, each even asserting the sufficiency and legality of a mere paper blockade; and now, both have publicly renounced that error, by agreeing to the Paris Convention of 1856, to which each was a party.

In the former part of the present century, the British Government, in asserting its belligerent right to search, pushed its pretensions even to the extent of impressing from American neutral ships sailors claimed as British subjects, and owing allegiance to the British crown. This claim, doggedly persisted in, ultimately became an efficient cause, if not really the *causa causans* of the War of 1812.

But the United States, without committing itself to others by entering into entangling alliances either for offense or defense, has, from the days of Washington, pursued one uniform course of policy. Her sympathies were doubtless on the side of the Baltic Powers, yet her support of the first "armed neutrality" of those Powers, was guarded and qualified. The British pretensions to search, she firmly and constantly renounced and rejected; in 1812, going to war and fighting, to controvert the British claim to search for impressment, and to maintain her avowed principles and known practice. At length, in the career of peace, and to perpetuate that state, by removing amicably through negotiation all disturbing causes leading to war, the United States has entered into new treaty stipulations with Prussia, England, and other European states, as is believed, in reference to naturalization or citizenship.

And now, should the American proposition to discontinue or abolish the practice of making maritime capture of private property, at any future period be acceded to by the high contracting parties to the Paris Convention, and thus become incorporated into the international code by the assent, and originally at the instance of the United States, it would, indeed, be a consummation devoutly to be wished, in mitigating the evils of

war; at the same time, it would be an appropriate public recognition by all the Powers of the constant and undeviating adherence of this country to her avowed convictions of policy, principle, and practice, whether acting as belligerents, or looking on as neutrals, ever since the neutral Proclamation of Washington in 1793.

At the present period, the original American doctrine, to which the United States have firmly adhered, is generally acquiesced in by most of the leading powers and commercial nations of Europe.

In diplomacy, several occasions have occurred for its frank and manly vindication. In the beginning of the present century, Rufus King, in 1841, Andrew Stevenson, and in 1843, Edward Everett (when Daniel Webster was American Secretary of State), severally set forth and defended, in their public stations, the true American doctrine, now generally accepted and established.

In law, this right of search, as claimed to the extent of impressment of seamen, has ever been doubted and denied. The American protest against this pretension has been of long standing, and constantly urged.

By the American authorities, usually referred to, the *Nereide* (9 Cr. 427) and the *Marianna Flora* (11 Wheat. 42), it appears that courts, jurists, statesmen, and publicists all agree in upholding the right of search by visitation or detention to a reasonable and qualified extent, for the purpose of ascertaining the nationality of an intercepted vessel, and the good faith of a neutral owner or master.

With certain restrictions, the right of approach, visit, search and detention is a proper principle and inoffensive practice. It is a preventive measure for securing the rights of belligerents, either *bello imminente* or *bello*

flagrante, against unneutral acts or conduct, and *mala fides*. It is an absolutely necessary, and an exclusively war right, which cannot be lawfully exercised in time of peace, unless it be in pursuance of some existing neutral stipulation by treaty or otherwise. There are clauses in treaties, in modern times, which tolerate and permit the exercise of the right of search to a qualified extent among neutrals. So also, treaty stipulations may exempt merchant vessels, while under convoy, from visit and search, the convoying ship vouching for their observance of good faith, and the absence of all fraud.

The general limitation is, that search may extend to merchant ships, but not to men-of-war.

On the highway of nations, approach may be harmless; visit excusable; search justifiable; and detention obligatory. The first may be for information merely; the second, for further inquiry; the third, to allay awakened suspicion; and the last, to settle legal title to prize by making capture.

Though all may differ in degree, yet each right either includes the others or presupposes their existence; for you cannot detain without approach, visit, and search; and *vice versa*, without the preliminary rights of approach and visit, search would be useless; and without that of detention, it would be practically inoperative.

Some states and jurists differ as to the relative signification of these several rights; the French term *visite*, is synonymous for the English phrase "visitation and search;" but Hautefeuille, Ortolan, Massé, and other French publicists, make a distinction between *visite* and *recherche*.

Referring to one other authority, the *Antelope*, (10 Wheat. 119,) the result, in the American sense, would

seem to be, that the rights of approach, visit, search, and detention, are admissible by the law of nations, and so recognized in time of war. Hence, since the decision of the *Maria* and other cases referred to, the belligerent right to intercept, on the high seas, a neutral vessel, in order to make inquiry, examine papers, learn her national character, mercantile employment, or destination, is undoubted; more particularly if such vessel be in the vicinity of an interdicted or invested port. Therefore, a corresponding duty is devolved upon belligerent cruisers, wherever stationed or cruising, to enforce this right. This is required by a national necessity, and the law of self-preservation, to prevent the transportation of supplies and war materials to an adverse belligerent; which, if not prevented from reaching such hostile destination, would materially contribute to the aid and comfort of such adverse belligerent, through the agency of a fraudulent neutral.

Whenever neutral vessels are intercepted, and upon search, are discovered to have been laden with contraband goods, or engaged in carrying hostile dispatches, troops, naval, military or other officers, such vessels may be rightfully seized and sent into port for adjudication by the proper prize tribunals.

Although in 1780 and subsequently, the Baltic Powers assumed a defiant position, and even armed in defense of this assumption, yet their pretensions were resisted in England, where the course pursued by these allies was looked upon as an attempt to interpolate, by force, a novel doctrine into the code of maritime international law. But the attempt failing, the general right of search has been deemed in Great Britain incontrovertible. See in the *Maria* (*supra*), the condemnation of an

entire fleet of convoyed Swedish merchant ships, instructed to resist search. With the qualifications indicated in the preceding pages, the same right is admitted in the American courts.

This decision may be supposed to have effectually disposed of the pretensions of the combined Baltic Powers to assert the Russian doctrine as advanced, that "free ships make free goods," and which those powers endeavored to enforce by what is usually understood as the "armed neutrality" of the Northern Powers.

NEUTRALITY.

THE principal grounds, recognized by international law, for exercising the full belligerent right of capture are three, namely: 1. breach of blockade; 2. carrying enemy property; and 3. transporting contraband goods to an enemy port. With the advent of war, all legal commercial traffic and intercourse of belligerents ceases. There cannot be a war for arms and a peace for trade; a war for arms is the same upon commerce, and a cessation of hostilities restores trade.

Neutrals, however, may pursue their accustomed trade, provided they violate or contravene no belligerent right. There are several rights of belligerents which general neutrals are bound to respect. They must not enter blockaded ports; they must not transport contraband goods to either belligerent; and they must not resist the belligerent right of search, and reasonable detention for search. Though stated negatively, these are positive neutral duties which must be invariably observed by all neutral states, desiring and disposed to preserve amicable relations with either or both parties engaged in carrying on war.

General neutrals have been spoken of; but there may be particular states who may, as a matter either of policy, comity, or caprice, see fit to accord and concede belligerent rights to both parties engaged in hostilities. Such may rightly enough be designated as declared neutrals. By the law of nations, general neutrals surrender so much of their sovereign rights as may be necessary to enable them to conform their action to the policy prescribed by either party to be pursued in asserting his belligerent rights; while, by the very act of conceding belligerent rights formally in advance, the declared neutral also concedes the right of visit and search, as well as that of detention for the purpose of search. Indeed, one includes the other, and neither can be of any appreciable value without the other. Both aim to accomplish the like result, which is the discovery of contraband property or persons. And for this purpose, the declared neutral, both by the law of nations and his own voluntary declaration, parts with so much of sovereignty as will permit recognized belligerents to intercept, on the highway of nations, neutral ships to be delayed, overhauled, and examined.

Such was the effect of the recognition of the Confederates as belligerents by England and France at the beginning of the American Rebellion. By conceding those rights, each state voluntarily parted with a portion of its sovereignty, with superadded solemnity, and independently of the law of nations. Whether in so doing, their respective neutral obligations became stronger for being self-imposed, or any belligerent rights were thus superadded to those usually conceded and accorded by international law, may yet become a grave question for future discussion.

Of this one fact, all publicists, jurists, lawyers, judges, and statesmen, ought certainly to feel assured, that no public declaration by a state can, *per se*, operate as an exoneration of such state from its neutral duties and obligations, however imposed, whether by its own act or the public law of nations.

For maritime purposes, the ocean is deemed the highway of the commercial world. All nations are free to traverse it at will, either for trade or navigation. No sovereign can reduce it to his exclusive possession but by force and violence. To use the language of Grotius, it is a "*mare liberum*" absolutely, in time of peace. Merchants, traders, travellers, navigators, explorers, and philanthropists may freely cross it for colonial, coastwise or foreign trade; for pleasure or profit, for improvement in the arts, sciences, general culture, and literature, explorations, or on missions for moral, religious, charitable or benevolent purposes. Such is the law of nature, and freedom is the normal state and condition of the sea. Pirates, rovers, robbers, and other freebooters may indeed infest it; and without the restraint of honor or justice, and uncontrolled by law, may change its character. International warfare may likewise qualify its normal condition, and *mala fides* may metamorphose it. Treaties may extend the rights of man, or restrict the law of nations, or the law of nature may yield to the changes and fluctuations of the law of nations.

But without some warlike, commercial, or political convulsion, the law of the sea is, and its normal condition must ever be, freedom, in which all states and peoples are practically independent. This freedom, however, disappears when peace ends and war begins.

Then belligerents may crowd and cover the ocean with their rovers, cruisers, and corsairs, sometimes in defiance of all law, and thus it may be that neutral rights become either abridged or abrogated, suspended or superseded.

In time of peace there is no rightful exclusive control over the sea's surface. States, indeed, may claim cognizance over their own merchant marine, and exercise jurisdiction over their men-of-war, by laying embargoes, adopting police regulations, passing navigation laws, or imposing other restrictive measures for revenue and trade. Over their own shipping it is possible that states may be omnipotent, but over that of others they are impotent. Both the law of nature and nations recognize neutrality as the normal condition of the nations. Peace is at once the result and symbol of universal neutrality. Without some disturbing cause of war, interest, policy, hate, passion, resentment, hostility, jealousy, rivalry, or ambition, all nations must necessarily stand toward each other in the relation of neutrals. When any such disturbing cause shall unhappily intervene, then an abridgment, abnegation, or abrogation of some international rights may occur. In assailing his adversary, a belligerent may curtail the general rights, privileges, or immunities of a neutral, either by interdicting the accustomed neutral commerce, closing particular ports, or stopping generally all trade and navigation.

Assuming a general neutrality to be the natural and normal relation in which all political states stand toward each other in time of peace, it is plain that this relation will remain undisturbed, so long as international harmony shall prevail among the nations of the earth. But pretexts may be sought to break up this pacific

predicament of states. They may be of a moral, religious, political, diplomatic, or conventional nature, and promoted by war, treaties, or alliances. The result is, at all events, war; on the occurrence of which, the political *status* and character of all peoples may be classified:—

First. As belligerents;

Second. As neutrals;

Third. As allies; or

Fourth. As mercenaries ready for any service.

Usually, all are either neutrals or belligerents, as allies become easily converted into belligerents, even if they are not oftentimes bound so to be by antecedent treaty stipulations. The fourth class comprises the mere hireling soldier, the rovers, corsairs, and pirates of the Middle Ages (now an extinct race), who would fight for a foreign prince from a love of gain and thirst for plunder, though no allegiance were due to such prince.

Accordingly, among independent nations, there are generally but two parties concerned, whose duties or rights need to be defined or defended; since, in regard to allies, their tendency to become, openly or clandestinely, belligerents, is irresistible.

So also, there are two kinds of neutrality, natural and artificial: sometimes they have been designated perfect and qualified, while the French professor and publicist Burlamáqui designates neutrality as natural and particular. The first kind may be universal neutrality, to which all may naturally and do readily conform. The other kind is partial, limited, and restricted to a few parties, and not necessarily involving them, but by their own choice and election. In that sense,

it may be termed a particular neutrality, created by reason of some existing political compact or treaty engagement.

But, in the absence of any such treaty engagement, when a new power assumes to take rank as an independent state, and claim recognition as such, those neutral states who incline to concede belligerent rights and acknowledge independence, may declare their neutrality, if they do anything. But the better way would be to remain in a state of general neutrality, if they desired to observe impartiality. Inactivity would be preferable, even if not masterly.

Therefore, in this treatise, preference will be given to the distinction as made to exist under the terms —

NATURAL AND DECLARED NEUTRALITY.

By a declaration of neutrality, the party making it publicly engages and pledges the national faith that he will observe the strictest impartiality. Thus the declared neutral compromises his position and rights as a general neutral; and impliedly imposes upon himself other and more stringent duties and obligations than would naturally devolve upon him by the unabridged or unextended general law of nations.

In the recent American Rebellion, the proclamation of neutrality, the practical recognition of the Confederates as an independent power, and the consequent elevation of rebels to the rank and respect of belligerents, contributed largely to complicate the hostile operations of the United States, prolong an internecine war, and to magnify materially the loss and destruction of life and property. The responsibility for this loss and destruc-

tion presents for settlement a novel and startling problem in the ethics of public law. The ordinary observance of a nation's natural or general neutrality would have spared life and property, abridged the war, and been unattended with practical harm or help to either belligerent. On the part of England and France, their preference to elect the position and attitude of a declared neutrality was the first step toward open sympathy and contingent aid, and was so regarded at the time. This false move created a bad precedent, and readily paved the way to subsequent unneutral and undisguised hostile conduct.

The responsibility for this novel, if not unprecedented course by neutral nations, can only be settled by fixed rules of law, and the established and inherent principles of justice, as sanctioned by the recognized usages and the practice and comity of nations. That enemies, allies, or mercenaries, should have pursued such a course, creating so undesirable a precedent, would have caused but little surprise. But that avowed, professing, proclaimed, or declared neutrals should so far forget their neutral duty, or the rights of a known friendly belligerent, either by making a precipitate recognition of one belligerent, or uttering rhetorical denunciations of the other, with the possible ulterior view of helping one and harming the other, is in contravention of the first principles of a natural, honest, and sincere neutrality; in derogation of the public international law, and, as affecting England, in flagrant violation of her own municipal law, and the solemn injunctions and formal warnings as contained in the Queen's Royal Proclamation.

Admitting the general right of independent nations

to elect and take such neutral attitude as they may deem politic or expedient, yet, whenever they shall have once publicly taken their choice from policy, timidity, selfishness, or other motive, then are they bound, by every principle of honor, justice, good faith, and fair dealing, firmly to adhere to their chosen position, without vacillation or deviation. And the obligation to observe this becomes, if possible, stronger, whenever the attitude elected to be taken shall be that of a declared neutrality. The formal declaration of the sovereign of this election, would seem to bind all its servants, as well as its subjects, to the strictest impartiality, and a due observance of its general and particular injunctions is imperative. The slightest departure from either affords a well-grounded cause for representation, remonstrance, or complaint; and a consequent right to demand reparation or apology, explanation or indemnity. Doubtless the instances will be rare when this self-imposed duty can be positively disregarded without bad faith. It is not to be supposed that any sovereign would voluntarily declare neutrality except *optima fide*. Nor can it reasonably be presumed that any faithful executive government would deliberately advise such a measure, without an intent rigidly to enforce it, and seasonably supply all the needed administrative means required to cause the due enforcement of such proclaimed or declared neutrality.

An act of such solemnity, so deeply affecting the material interests of a friendly belligerent, ought to be sustained by all the ordinary resources, measures, and moral means which may be at the command or within the control of the existing government, whether such measures be of an executive, legal, legislative, or judicial character.

If, therefore, a neutral government shall fail to conform its conduct to this imperative duty, such failure will obviously furnish ground for suspicion of its sincerity toward an admitted neutral belligerent and of treachery toward its sovereign. Toward the belligerent, such delinquency should be deemed a fraudulent and hostile act ; toward its sovereign, such remissness should be deemed a treacherous act, compromising the good faith of that sovereign. In the one hypothesis, a neutral belligerent is deceived, in the other, a confiding sovereign will have been betrayed. By either the act of deception or act of perfidy, a neutral nation becomes compromised, and its honor may have been sold out to the highest bidder or most unscrupulous emissary.

The obvious, though it may be remote result of such perfidy may be to provoke ulterior retaliation ; to be retorted at a time and in a manner least calculated to incommode the sufferer, and best calculated to inflict loss and injury upon the unfaithful wrong-doer.

There can be only a slight distinction made between the liability of a state and the responsibility of its public servants. In theory, the English sovereign who wears the crown can do no wrong. But no such theoretical immunity can well be extended to the responsible advisers of the crown, or to the state itself whose political liability is coextensive with the official responsibility of the ministry. A bad minister may make a bad precedent only to be followed, if not immediately, yet at some future period of the world's history. Persons or states wantonly and causelessly aggrieved, have long memories ; and a national wound or grievance remains and rankles long after its infliction ; and if unredressed, may be faithfully transmitted to succeeding generations.

Among nations, therefore, whenever any wrong has been from inadvertence committed, it is well and wise to proffer seasonable apology, explanation, or indemnity for it; and if committed designedly, to offer ample reparation, in kind or its equivalent if practicable, so as effectually to remove all lurking cause of national alienation, disaffection, or animosity.

The preservation of amicable relations, if such can be continued or restored through adequate remuneration, is infinitely more important to a state than the mere saving the wounded pride or self-esteem of a haughty and hasty, or blind and blundering ministry. The penalty to a state may be too great, to the minister but trivial and unimportant.

Legal questions as to neutral rights and privileges can only arise where there is an admitted belligerency existing. Capture, prize, and adjudication may then take place, and neutral rights and belligerent duties be fully discussed. This will probably continue so to be, until the extinction of maritime capture shall be adopted by the European nations, as was proposed by the American Government to the Paris Convention of 1856. There are still in abeyance other questions of difference between the United States and European states, which are likely to remain outstanding and unsettled, unless adjusted by treaty or other appropriate mode which may be satisfactory to the United States. That adjustment cannot be effected by treaties of alliance, as they would be in derogation of the policy adopted and bequeathed by Washington; nor can it be effected by arrangements which would contravene the principles and policy of the Monroe doctrine. If the United States were in any way delinquent, she would soon find

a way of removing all grounds of difference, as her avowed policy is and long has been, to claim only what is right and submit to nothing wrong. Indeed, for all nations, it will be found to be easier to do what is right than to attempt to avoid it by doing something wrong.

Differences in the decisions of the legal tribunals are limited in number, and will be particularly noticed in the authorities hereafter to be cited. They involve rather technical points than matters of principle and policy.

As universal neutrality presupposes peace, such a state of neutrality cannot originate either controversy or discussion. But a particular or declared neutrality implies an actual or possible belligerency. It is indispensable that there shall be parties belligerent, before the state and character of a neutral is capable of being defined. As war begets a state of belligerency, so belligerency necessarily precedes the debatable condition and character of neutrality.

Unlike allies, neutrals are presumed in theory to take neither side ; observing the strictest impartiality toward both parties engaged, dispensing their good offices alike to each, neither doing or wishing harm to either belligerent, nor exhibiting any disposition to help either belligerent. And the attitude of neutrality, when publicly taken by a state or sovereign, imposes upon such state or sovereign the necessity of a strict observance of all these varied, negative, passive, in short, neutral duties. And the same obligations which are imposed upon the state are likewise enjoined upon the subject or citizen ; so that any conceded or declared neutral duties must be alike observed by state or citizen, sovereign or subject, people or the servants of the people or state.

Thus the line of duty and course of conduct is plainly prescribed, so that neither the minister, magistrate, or masses can well mistake as to whither it tends, or to what it may lead. A due observance of it obviously tends to peace, a non-observance to war. By adhering, therefore, to its neutral duty, a nation will avoid all danger of war, and preserve and continue its future friendly relations with other states. If, however, a state will risk an interruption of those relations, it must also risk the consequences.

Any departure from the duty of neutrality, whether that duty be enjoined by the law of nations, found in existing treaties, be prescribed by the local municipal law or contained in a proclamation of the sovereign, endangers the good understanding and future amicable relations of neutral states.

Therefore, in modern times, all just sovereigns make it a point to observe, with scrupulous honor, all duties growing out of their neutral relations with belligerents, however they may be defined or created. To act in contravention or derogation of these high political duties in time of war, *flagrante bello vel imminente bello*, would be to practically ignore the rights of belligerents, and disavow the obligations of neutrals. If a neutral do not remain neutral *optimâ fide*, he thereupon becomes practically an ally or enemy. And a converted ally becomes naturally the bitterest of enemies.

At the present advanced stage of civilization, the true neutral and the known ally may be regarded as opposite in character as are open and declared belligerent enemies. A like distinction may exist between the true neutral and professing or declared neutral. Indeed, a merely professing neutral, with no sincerity and

no fidelity, may inflict more injury upon a trusting belligerent than it might be possible for an open and declared ally to inflict. For, under the guise of friendship, the insincere neutral may reveal secrets of state fraudulently obtained ; show his good offices in collecting and imparting dangerous information to the enemy, disclose military movements contemplated, which, by his ill-timed and treacherous discovery and communication, may be rendered abortive ; telegraph or signalize naval expeditions so as effectually to baffle the object of their operations ; negligently enforce its own municipal regulations, in total disregard of its own self-imposed neutral obligations, or culpably furnish shelter and asylum to known and declared belligerent enemies. All these contingencies may possibly happen from the loose practice of a professing neutral, who, having no sincerity in his assumed attitude of a declared neutrality, will be neither earnest nor constant in observing his neutral duty. Therefore, it is plain that a merely professing neutral may be positively more dangerous than an open and avowed ally. Against the latter, the belligerent may be put upon his guard, but against the former, he would be lulled into a fatal security.

Among states, such effects and results should be studiously avoided and carefully guarded against. This will ever be the case, where an upright minister and faithful law officer may happen to be privileged advisers of an impartial and high-minded sovereign.

While in 1793, England and France were at war, Washington's issued proclamation of neutrality was then faithfully adhered to, both by citizens and Secretaries, and its every instruction most strictly observed. The then Secretary of State, Mr. Jefferson, exhibited

his profound and precise knowledge of neutral duties, at that early period, and his administrative skill and ability in enforcing them. His letter to M. Genet of August 7, 1793, and that to Mr. Hammond of September 5, 1793, are masterly specimens of diplomatic directness and ability. The extent and limit to which reparation and redress would be made are plainly pointed out; nothing, indeed, is left vague or expressed equivocally.

In his letter of August 7th, the American Secretary reminded M. Genet, that the President, by a letter of June 5th, desired that all those vessels which were armed in American ports to commit hostilities on nations at peace with the United States, should depart; and by letter of July 12th, that such vessels as remained or had left only to cruise on our coasts, should be detained. The Secretary further informed M. Genet, that he was now charged to state that "pursuant to positive assurances given in conformity to the law of nations, the President considers the United States bound to effectuate a restoration or make compensation." And for all subsequent captures, the French were expected to cause restitution; if not, then the United States will indemnify, and expect reimbursement of the French nation. For this reason, future fitting out will be prevented, and asylum refused in all American ports. And for the involuntary instrumentality of the United States in the fitting out and escape of these French cruisers, reparation was expected, and regret expressed that neutral injunctions had not been observed and the government consulted before the armaments were made or the cruisers dispatched from these shores.

In Mr. Jefferson's letter to the English minister, Mr.

Hammond, dated September 5, 1793, he assured the latter, —

First, that there would be an exclusion from all further asylum in American ports of French cruisers armed there, to depredate upon the commerce of a neutral and friendly nation, and that there would be a restitution of certain named vessels, as the *Lass*, *Henry*, and *Jane* of Dublin.

Second, that if measures for restitution fail in their effect, then compensation for the vessels is to be made by the President.

Third, that Great Britain should stand proximately on the same footing as other nations with which the United States had made special engagements by treaty.

Fourth, that the governors of the several States were to be instructed to invoke the aid of the custom-house officers and employ all other means in their power for making restitution, at the same time soliciting from the English legation all information which it might impart calculated to check the illicit depredation in future ; concluding thus : —

That the President contemplates restitution or compensation in cases before August 7, 1793 ; and after that date, restitution if practicable.

Thus it may be perceived not only how faithfully Washington's Proclamation was, on his part, adhered to, but also how firmly and fairly the President's principal Secretary upheld and enforced the doctrines of that proclamation.

Again, when M'Leod was indicted in New York for his confessed participation in the destruction of the *Caroline*, the British Government interposed, somewhat offensively, to shield the accused ; and, on suitable rep-

resentation that the act was adopted as the act of the government, McLeod was surrendered, or, at all events, never tried; the United States preferring, at the time, not to pursue the British subject, but hold the British Government hereafter to its precedent and practice.

More recently still, when the British ministry, then declared neutrals, saw fit to make a peremptory demand for the return of some Confederate emissaries and other officers taken from the Trent upon the ground that there had been no legal adjudication of the intercepted post-office packet, the satisfaction exacted was readily accorded to them by the American Secretary.

The compliance with the demand was entirely conformable to the doctrine and practice as maintained and followed by Americans. The opportunity was not, therefore, to be lost for their public official servants to inculcate, by example as well as precept, upon other states, the value of established principles and a steady adherence to them in all international intercourse with others, whether neutrals or belligerents. And although the particular infraction or delinquency, justifying the complaint, was indeed painful to all true Americans, yet the recognition by Great Britain of those settled principles so long practiced upon, and steadily adhered to, by the United States, was welcomed as a fitting and appropriate acceptance of the better interpretation of public law, and not, therefore, without some substantial compensation as a precedent.

These examples well illustrate the comity and good faith observed by the United States in the past, and so likely to mark her conduct in the future, toward all nations, in her international policy and practice.

A government or a people, whose example has been

thus faultless, should not be subjected to the necessity of seeking redress for its people, who may have suffered by reason of the hasty and indiscreet zeal, administrative short-comings, or general political delinquencies of any professed or declared neutral government. Voluntary indemnity should be proffered without demand.

The Proclamation of Queen Victoria, in 1861 (like that of Washington in 1793), was doubtless issued by the sovereign who signed it in perfect good faith; not doubting that its every injunction could be, and having a right to presume, would be, duly and faithfully enforced.

Without, therefore, pausing to criticise the premature precipitancy with which the British ministry had prepared that proclamation for promulgation to the belligerent and neutral world, the more vital and appropriate inquiry to be considered in this treatise is under two questions of fact and law:—

First. Had the British ministry the power, if so disposed, of enforcing the Queen's injunctions of strict neutrality, as contained in her Royal Proclamation of May 19, 1861?

Second. Did the British ministry attempt, in good faith and with effect, to enforce the Queen's injunctions of a strict and impartial neutrality, and were they measurably successful in their efforts?

Possessing the power and not effectually exercising it, would be an indication of bad faith and duplicity on the part of the servants of the crown, which might seriously compromise their sovereign. In her speech to Parliament, August 6, 1861, the Queen expressly lamented the continued existence of the civil war in

America, and reiterated her determination to preserve not only a strict but the *strictest* neutrality, *as a government*, between the belligerents. On this occasion, the emphasis in the superlative degree, seems to have been her own, as a sovereign, and directed to her servants, *as a government*. It is not to be supposed, that the Queen then had just cause for misgiving as to her ministers' fidelity; for otherwise it is to be presumed that any person fit to be a trusted minister of a confiding sovereign would have voluntarily withdrawn from her official service. This is one of those enigmas in politics or problems of state, which time only can disentangle or solve.

In England, ministers have all power, and may, therefore, be presumed to be omnipotent in all measures of policy, police, or administration. Had there been a single injunction in the royal proclamation of the sovereign which her servants deemed incapable of being enforced, it must have been as well known to the Foreign Secretary before as after the issue of that proclamation. On the part of the Secretary, there was then either concealment, or duplicity, or both. At all events, there was a manifest want of that manly, plain, and direct speech and thought, which characterized the diplomatic communications of Jefferson in 1793 to the French and English representatives of belligerent and neutral nations.

In the absence of all proof or allegation to the contrary, it may then be assumed, as it should ever be presumed, that all the injunctions of the Queen were such as might be deemed by the ministry capable of being enforced. It cannot be supposed that her "loving subjects," if loyal, would have obstructed her; or, indeed, that her ministers, if faithful, would have per-

mitted those subjects to obstruct and embarrass their Queen in observing her declared duty of impartiality toward the recognized belligerents.

If the neutrality proclamation of George IV. in 1825 could have been duly observed, and properly enforced, as between the Turk and Greek, what should prevent the enforcement of that of Queen Victoria in 1861? Both were framed upon the same principle, and run substantially in the same mould. There was a Foreign Enlistment Act then, as there is now; consisting of similar, if not the same provisions. These provisions were no better known to the Foreign Secretary, George Canning, the Premier, Earl Liverpool, or the legal advisers of the crown of that day, than they should have been familiar to the Foreign Secretary, Lord Russell, the Premier and law advisers of the crown of a more recent period. Hence the presumption would seem to be irresistible, that any and all of the Queen's injunctions in 1861 were deemed, by her responsible advisers, capable of being duly observed and strictly enforced, as well as those of George IV. in 1825.

Both proclamations declared it to be the "royal determination to maintain a strict and impartial neutrality in the contest between the contending parties;" warned "all persons whatever entitled to our protection" not to presume, in contempt of the royal proclamation and the sovereign's high displeasure, "to do any acts in derogation of their duty as subjects of a neutral sovereign," or "in violation or contravention of the law of nations;" such as entering into the military or naval service within or beyond the sovereign's territorial dominion, or preparing others to do so; fitting out, arming, or equipping any vessel, as a ship of war, for either combatant;

breaking or endeavoring to break a lawfully established blockade of either party; or carrying officers, soldiers, dispatches, arms, or any contraband article for the use or service of the contending parties, or either of them; on pain of incurring the penal consequences imposed by municipal or international law.

. Useless indeed were all these parchment prohibitions and injunctions, unless Parliament, from policy, or ministers, from duty, should cause them to be enforced. Of what avail would they be to friendly nations, if ministers were possibly incapable or indisposed to compel compliance with them? Either an incompetent or inefficient administration is a standing reproach, and may become a curse, to a nation.

It is a self-evident proposition that the non-observance of the sovereign's injunctions, either by her subjects or servants, must render the Queen's royal proclamation nugatory. For the want of official vigilance, no vigilance of others can be substituted. Its absence will be constantly felt. And in such a state of affairs, with a faithless ministry to serve a faithful sovereign, the American blockade and the Queen's proclamation must necessarily come in conflict. If one is violated, the other cannot be observed; and thus the entire benefit of a declared neutrality would be practically extended to one belligerent. If the right of refuge and asylum should be accorded to the Confederates, still no corresponding or equivalent right or benefit would pertain or accrue to the Federal authorities. The operation was therefore unilateral; not neutral but partial.

As a naval power, the Confederates were not only inferior, but, of themselves, upon the ocean, impotent. Therefore, without the aid of foreign powers, proffered

openly or in disguise, their maritime power would early have become annihilated. All overtures of this description were readily accepted and greatly encouraged.

Emissaries crossed the ocean; gained audience with professed neutrals; shaped policies; manipulated ministers; disseminated prejudices; instilled unneutral opinions; and ultimately so subsidized as to control the neutral press. From such influences even the Foreign Secretary in England was not entirely removed; unless the prevailing suspicion may have been well founded, that he was, at the start, in open and avowed sympathy with the Rebels. And this latter hypothesis finds favor from the fact that Lord Russell, early and needlessly, spoke of the collision as a war for independence on the part of the South, and of empire on the part of the North. Such an ill-timed avowal not only compromised his sovereign, but committed the minister, personally and politically, to one belligerent. This avowal is believed to have preceded the Queen's speech of August 6; in which she urged the "*strictest neutrality as a government.*" On the part of the minister, therefore, it was an unmitigated mistake. A dignified reserve or wise reticence would have better suited his high position, and conformed to his sovereign's injunction of strictest neutrality. If he desired to serve his country or Queen, his sympathy should have been smothered, partisanship ignored, and not boisterously paraded and uttered in Parliament. By this indiscretion, the British ministry were ostensibly, if not irretrievably, pledged, as allies, to the Rebels, in advance; while their Queen and sovereign was fettered by the proclamation, and so bound, in good faith and honor, to a strict and impartial neutrality as between belligerents. In this conflict between the

Queen's honor and her minister's want of it, belligerent rights went to the wall, and neutral duties were either neglected or unheeded. The minister's manifest disregard of the sovereign's proclamation so complicated public measures, as to seemingly absolve subjects from all political allegiance and neutral obligations, and finally to demoralize the whole kingdom. It is not, therefore, surprising that the English masses, mechanics, and even magistrates participated in the prevalent unneutral sentiment, and ultimately became indifferent to the due observance of their sovereign's injunctions. And such were the legitimate effects of that want of good faith and rectitude so conspicuous in ministers, who could, if they would, have caused every injunction of the Queen to have been duly and strictly observed.

On the one hand, Confederate agents had access to English ship-yards and work-shops, bankers and brokers, factories and foundries, and even to the offices in Downing Street.

On the other hand, the Federal minister was at first almost repulsed, never positively snubbed, afterwards tolerated, and finally only reluctantly listened to, after the mischief had been accomplished. Cold reserve and official incivility marked the deportment of Lord John Russell toward Mr. Adams from an early day after his arrival in England. This absence of all official candor, courtesy, and sincerity, would be deemed unneutral conduct of itself even in diplomatic negotiation. It would indicate and might betray duplicity in the background. Under the circumstances, it was neither just, fair, nor honorable. But even this line of conduct was not without imitators.

The course pursued by the French Emperor was

closely assimilated to that of the English Cabinet. In total disregard of the Monroe doctrine, the Emperor elected this time to quarter French troops in Mexico, with a view of getting French foothold there. This comminatory act, and the time selected for it, were at least equivocal, for another professed neutral, presumed to be acting in good faith, and with no sinister design, or ulterior purpose.

But both England and France, as the sequel shows, were ill-advised and precipitate. The conclusion predicted, and perhaps expected, was never reached. The Rebellion was crushed; the American Union and its complete integrity were vindicated; and now that Union is likely to become stronger than ever, both in military and naval strength, as well as in its material wealth and prosperity. The result in Mexico was, that the French troops were withdrawn; Maximilian sacrificed; and such atonement proffered to the injured house from which he sprang, as seemed to be suited to French diplomacy, or required from Imperial disinterestedness.

In England, Lord Russell was both too fast and too slow. To recognize the Confederates, he was too hasty; to stop illegally equipped cruisers, he was too tardy. If Mr. Adams desired delay, then the Foreign Secretary was over-prompt: when Mr. Adams urged promptitude, then Secretary Russell became leisurely dilatory.

The royal proclamation imposed a duty of strict and impartial neutrality upon the English people. That duty was not observed, because the English ministry were remiss, and exhibited bad faith toward a neutral state at peace with their Queen. The bare suggestion that England could not have observed and preserved the strictest neutrality as required by the Queen's 6th

of August speech would have been deemed an affront by Lord Russell. His malversation seems, therefore, the more inexplicable. To reconcile this conduct with his sovereign's injunctions would seem to require more than the ordinary powers of logic and analysis of even a British minister, who, though bound by his duty and oath of office to appear to be neutral, yet, from inclination and choice, preferred to become an open ally practically.

To England, this unfortunate preference may become a cause of future regret. England's honor, interest and integrity are best subserved by positive good faith. No nation, in its intercourse with foreign states, can afford to be dishonest. The minister who advises such a course, or disregards the sovereign's plighted faith, is not only a faithless minister, but a bad man. The United States were entitled at least to good faith; but England did not accord it.

If ever the Alabama and similar claims shall hereafter be recovered, their recovery will be upon the ground that, during the American Rebellion, the course of the executive government toward the United States was incompatible with the Queen's proclamation; that the good faith of the sovereign was compromised by the bad faith of her servants; that these servants, possessing the executive power to observe, conserve, and preserve their sovereign's pledged faith, did not seasonably or effectually exercise that power to that end. For this delinquency, ministers are responsible; and for its consequential damage, the state is liable.

What that damage may be, future history and the logic of events must inevitably disclose. There is a destiny for nations; and there may be retribution for

national wrongs. What the one may be, and when the other may be obtained, are questions for time to solve. Precipitation has not hitherto been promotive of neutral prosperity or harmony ; and, therefore, a dilatory inactivity may not only be the more masterly, but really the most pacific policy to be pursued.

Without dwelling on the details of this inquiry further, the conclusion must be obvious, that not only could the Queen's proclamation, but her August speech also, have been strictly conformed to by the ministry, had they the disposition. The want of this disposition was the *causa causans* of that national wrong of which the United States can never cease to complain. *Hinc illæ lachrymæ*. Should this wrong ever be redressed, let it be done voluntarily, after the sober second thought of the English people has been duly sounded and settled, and under the premiership of Gladstone if it may so be, or if not, then during that of the grand Commoner, John Bright, or other liberal minister. A nation's good faith is worth retrieving, even at great cost or sacrifice ; but a minister's false pride is not worth defending at any cost.

What Americans, as belligerents, complain of and feel justified in so doing is, that a neutral sovereign's injunctions were disregarded, *flagrante bello*, by her own subjects and servants. If all Englishmen had acted as fairly as their Queen had talked, no occasion could have occurred, now or hereafter, to seek redress or reparation, for the depredations of the Alabama or any similar illicit cruiser. The Federal navy might, without foreign practical intervention, summarily have disposed of any fleet of the Confederates, could they have equipped one. But a neutral people and government, in derogation of

the royal proclamation, became practical allies; supplied despairing and suppliant rebels with the sinews of war; built and equipped for them large war vessels; manned and sent them on their mission of destruction; dealt a treacherous blow and inflicted gigantic loss upon American commerce: wherefore reparation or compensation may rightfully be expected. If redress in any shape be hereafter made, let it, to the honor of England, be made according to Washington's precedent of 1793, gracefully and graciously; but not grudgingly or reluctantly. So England's lady sovereign would doubtless have it done; especially if Albert had survived. But the early decease (December 14, 1861) of this estimable prince has already proved to have been a public calamity to the United States, and may yet prove equally so to England. Moreover, Palmerston, the English Premier, has also since deceased.

There are four modes in which the restrictions on a prohibited trade may be removed by license. Leave and license to carry on prohibited trade may be procured in England:—

First. By the sovereign's signature, or royal sign manual;

Second. By order of the Privy Council;

Third. By royal proclamation;

Fourth. By act of Parliament.

And unless there be mutual existing treaty stipulations, it is not practicable otherwise to procure in England any extension of neutral rights or any suspension or relaxation of belligerent rights or duties. But in either of the modes above specified, may such extension or relaxation by license be specially legalized. If licenses may be so legalized, why may not prohibitions

be so legalized likewise? Wherein is a proclamation less cogent than an order of the Privy Council or act of Parliament? Each require the royal signature, and without that, neither would be of any more avail than so much parchment.

In *Ex parte Chavasse (supra)*, Lord Westbury said that a proclamation is but evidence of the municipal and international law. That position is not to that extent tenable, except for England. Prohibitions included in a proclamation may exceed in number, and differ in kind and degree from those prescribed by the municipal, or found in international law. If that be so, then novel or additional restrictions or relaxations may be legalized by a neutral's proclamation. If it be otherwise, then the proclamation becomes nugatory. But since licenses may be legalized by proclamation, it is difficult to perceive, why that mode of administering government may not be equally extended and effective, in interdicting breach of blockade, or enjoining other special neutral duties.

In the *Helene (supra)*, Dr. Lushington held also, that a contract to violate an established blockade was not a municipal offense, nor *per se* illegal. Again, the reply is, but such violation of blockade would contravene the proclamation; and if the proclamation be not nugatory, why should not the particular injunction against violation of blockade be enforced? A contract to violate a blockade is practically an attempt to violate, and either, it would seem, is legally equivalent to a violation of blockade. Such interdiction of blockade, therefore, may be as much legalized by proclamation as the granting of a license may be by the like measure, so far as the act may affect personally the subjects of the neutral sovereign.

It practically comes to this, that the act of the Privy Council, while sitting in court at Windsor Castle, Whitehall, or Buckingham Palace, the Queen present and presiding, should have no more force and effect upon Englishmen than the act of the Queen herself is entitled to, when sitting in the same court and place, with the advice and consent of the same Privy Council, she voluntarily issues her proclamation and affixes thereto her royal signature. The one is or ought to be as potential, in regulating the conduct of the subjects and servants of the realm, as the other. Both are authorized by the sovereign's presence, authenticated by her signature, and legalized by the joint act and concurrence of the sovereign and Privy Council. These acts, aside from and in addition to the municipal or international law regulations, may impose other restrictions or prescribe relaxations, as an exercise of the proper functions of sovereignty ; and as such, they are but an emanation of the prerogative power of the crown in reference to all its subjects within the realm. And whatever form may be assumed, or effect presumed to be given to either act, both are theoretically, and should be practically, equivalent acts, and alike obligatory on all subjects and servants of the crown.

Their non-observance, within the realm, would be a political and moral delinquency, justly incurring the sovereign's high displeasure, and legally contravening and violating, in respect to neutrals, not only their special rights, as particularized by such act of sovereignty, but also their general rights, as provided for in the local municipal law, or prescribed in the general international law ; for which neutrals necessarily have a claim for reparation.

If neutrals reposed confidence in any such acts, publicly decreed, or formally proclaimed, they were justified in so doing; and the neutral world had a right to presume that every such measure was not only adopted in good faith, but would be observed with good faith, especially toward both belligerents. If it were not so observed, then the imputation of blame, for such non-observance or breach of good faith, would necessarily fall upon the responsible advisers and servants of the crown, by whose official delinquencies, the state itself becomes, in its political capacity, liable to make reparation; and as this liability cannot be transferred to ministers personally for official acts, committed or omitted, it follows that the state's liability may be coextensive with the minister's responsibility.

From Washington's Proclamation of Neutrality in 1793, and one American case in 3 Dall. 133, *Talbot v. Janson*, a tolerably apt definition may be collected and framed. And reasoning from effect to cause, it is substantially this: that whenever restoration is imperative, then the capture must have been unlawful; but if, furthermore, such capture were effected with the aid and through means afforded by a neutral power, and the executive government of such neutral power could have prevented the capture, by withholding coöperation, or by the exercise of due diligence, but did not prevent it, then a state, so administered, or rather so maladministered, ought, in justice, to make compensation; provided that, at the time, specific restoration may have become impracticable. The proposition, if sound, is founded upon the legal ground, that a wrong inflicted, through the remissness or connivance of a neutral government, should be redressed or repaired by

that state, whose responsible government has been thus delinquent. And if this position be conceded, then all needed conclusions follow, to enable the jurist, publicist, or statesman, to justify the alleged claim of the United States, and also to establish affirmatively, England's liability for the same.

Time and reflection only will be wanting to demonstrate the correctness of this conclusion to sagacious, candid, and prudent Englishmen. The settlement may be longer delayed from the embarrassment and consequent exasperation of a portion of the governing classes of Great Britain, whose example and influence may possibly deter, for a while, others from acceding to the general American claim or its principle, however presented.

It is manifest that no particular exaggerated statement of the claim, made by individual public men or private citizens, can be regarded as the indispensable basis of any settlement, or criterion of any amount of claim to be agreed upon. The United States seeks justice only, not humiliation. Indeed, there cannot be humiliation in acting justly and doing right; it is rather elevation. All wrongs may be repaired without any compromise of dignity or honor. An indisposition to make reparation can only be transient; it cannot, in the nature of things, continue permanent. Passion, resentment, and all political or party policies must ultimately yield to the dictates of prudence, the demands of self-interest, and to the inherent and abiding love of peace and amity with nations.

If one set of men decline, another will incline to act with justice. The wrongs of one minister may be repaired by another. A self-willed premier may be sup-

planted by a more sagacious successor. And hence the utility and expediency of that periodical change in constitutional government; made so desirable by an insolence generated by its long possession; and sometimes so salutary to the state and people; as it may conduce to correct an unhealthy or artificial state of public sentiment and opinion, often created and kept alive by selfish public servants, for private purposes or unworthy ends. Such salutary mutations in office shield the state itself from detriment, and foreign states from injustice.

When, therefore, a great national wrong is occasioned by national or official delinquency, it is no more than just that the national resources or possessions should remain pledged and mortgaged for the ultimate reparation, redress, restoration, or compensation for that wrong. Present security is a guaranty to the sufferer of future indemnity; and whether the recent treaty be ratified or rejected, American merchants, who were likely to be the greatest losers, exhibited a specimen of sagacity and sound sense, in promptly protesting against such a patchwork adjustment, as that of the Clarendon Convention, unwarily assented to by the American minister, R. Johnson, and which was ill-designed to settle differences and alike unsatisfactory to all.¹

¹ The news of the rejection of the Johnson Treaty by the United States Senate, created in England some embarrassment, but no surprise. Some of the servants of the crown were slightly sensitive and nervous, but, on the whole, accepted the situation sensibly; especially those who had been members of the Palmerston Cabinet. These former colleagues of Lord Russell, in looking to the future for wise counsels, may well feel persuaded that the ultimate settlement can be only a question of time.

Mr. Motley, the American minister, was doubtless selected to represent the United States upon public grounds entirely. If so, the sequel may fully prove the wisdom of the selection. At the court of St. James, the more our

Far better is it to have no treaty than an unjust or impertinent one. Time and its ameliorating influences will soon produce a sounder sentiment ; and the United States may well afford to abide that improved state of feeling and opinions which must certainly come ; and, when it comes, cannot fail to insure justice and a proper reparation for the great national wrong and individual loss.

A practical test of the nature, depth, and extent of this national grievance may be exemplified to Englishmen, by a few hypothetical illustrations.

England has numerous colonial and insular possessions in other countries and climes ; all of them doubtless dear, and supposed to be valuable to the parent country. These were acquired, in different ways, at remote or recent periods of her history ; the acquisition of many was by settlement, of others by cession and capture, and a few by transfer. But, however acquired, Great Britain would be quite reluctant to part with all or any of them, upon compulsion ; as it would not only impair her integrity as a kingdom, but dwarf the power of patronage and curtail her commercial resources.

Should an attempt to effect a political separation be made, in any of the possessions, by rebels or by revo-

minister may resemble Franklin and the elder Adams in republican simplicity and homespun plainness of dress, the better. This he can afford to do, if he will only completely master all the details and duties incident to his difficult position.

It is expected that he will be truly and intensely American in all his tastes and tendencies ; and in his official intercourse, firm, frank, fair, prudent, and courteous. He ought, in addition, to comprehend thoroughly the public law, applicable to neutral or belligerent rights and duties.

Thus prepared in advance, he will in no stage be dependent upon others' legal aid, but solely influenced by official dispatches proceeding from the State Department.

lution, would the court or cabinet at London repose quietly at such an outbreak, or look on with calm indifference at any unneutral or fraudulent intervention by other states, to promote the rebellion ?

If the inhabitants of Newfoundland, Nova Scotia, New Brunswick, Prince Edward's Island, or Bermuda, and the Bahamas, acquired by settlement, revolt and aspire to independence, would England be unconcerned if Louis Napoleon were to pronounce the war, on the part of England, to be a war for empire and not for the preservation of her integrity ?

If Jamaica, Ceylon, Mauritius, St. Lucia, Trinidad, or Demarara, acquired by capture, were to be similarly afflicted, and their inhabitants should raise an insurrection, get possession of the public property, expel or take captive the royal soldiers, would England view with composure the premature recognition of the natives as belligerents by other neutral nations, thus conceding to their commissioned cruisers the right of refuge, shelter, and asylum in neutral ports ?

If Australia, acquired by settlement, and with a population of some 150,000, should break loose from British authority, overcome the royal forces, and undertake to establish by war and violence a separate independent state, would it be precisely in keeping with good faith, according to British notions, for Russia to hastily declare a strict and impartial neutrality, and then disregard that declaration ?

Suppose that Ireland were to raise the standard of rebellion, to liberate their native island from British thralldom ; and, thereupon the United States should recognize that people as belligerents, permit or not prevent the raising of armies and equipment of fleets ; and

then connive at the escape, from neutral ports, of armed cruisers to prey upon British commerce ; would it be deemed quite consistent with that strictest impartiality which Victoria proclaimed, and undoubtedly meant to observe with good faith, but the observance of which the Premier Palmerston did not permit; or, possibly, the premature decease of Prince Albert disqualified the bereaved and disconsolate Queen from keeping? or rather, would not England regard it rather as an indication of a tacit alliance to aid rebels in the work of disintegration or destruction? If so, would ministers exceed the rule of moderation, in denouncing such acts as outrages?

The Canadas, with an annual excess of expenses over income of £243,392 in 1865, is too costly to be coveted by any one, or retained and kept, except by England. There they remain perfectly secure from all danger, except such as their neighbors readily helped them to suppress during the Fenian raids.

The concession of belligerent rights to rebels elevates them, practically, in the view of international law, to the rank and respectability of independent states; accords to them the recognized rights of maritime warfare upon the ocean; extends to them the privileges of shelter, refuge, and asylum on land; exonerates them from the imputation, and purges their acts of the taint, offense, or crime of piracy; empowers them to trade in neutral ports for materials or ships of war; and, unless prohibited by the standing municipal law, or special interdictions imposed by some sovereign authority, contingently authorizes rebels not only to buy and build, man and equip, cruisers in neutral ports, but also to dispatch such cruisers on their hostile mission from neu-

tral ports, against the mercantile marine of a friendly nation at peace with the neutral world.

In case of intervention, therefore, no state, like England, with a naval force provided, and the means at hand to employ it, could long repose without resenting such unneutral intervention. If, indeed, these possessions, like Canada, were substantially of no pecuniary value ; and so dismemberment should be deemed a matter of small concern ; the state might not be tenacious of her territorial integrity, and would gradually become indifferent to political or national disintegration. Such, however, is not the lesson to be learned from the English character. If any grievance be inflicted upon England, her practice has been, to resent it. If, on the other hand, England should inflict a grievance upon another independent state, her policy is, not to relent. Right or wrong, therefore, neither her past practice nor her former policy will conduce to any relaxation of that stubborn tenacity, with which Englishmen are reputed to cling to a position, in which, by chance or design, they may happen to be placed.

Her conceded possessions are of some political, if not pecuniary use to her : since they serve to enable the home government to provide employment or sinecures for the many scions of an almost effete or moribund aristocracy, or places for educating, in the routine of office, other young Englishmen of known ability and promise.

Therefore, all her possessions in America, the East and West Indies, Africa, the Mediterranean, or elsewhere, may be deemed of such value, that none of them would be permitted to be wrested from her without a struggle ; and however small the island, or inconsiderable

the population, whether the possession may have been acquired by settlement, cession, conquest, or transfer, the whole naval force of England's 57 liners, 45 frigates, 62 screw and paddle sloops, and various armor-clad and other ships, even to the extent of all her 474 public ships, would be ordered to rendezvous for its protection.

For instance, St. Helena is the half-way stopping place to India; and was the grave, as it had been the prison of Napoleon Buonaparte, the greatest man Europe has known in modern days, if not in all time. That island in 1673 was ceded to and has since been held by England, for worthy or unworthy uses and purposes, without challenge or controversy. Suppose the present French Emperor should covet that island, either to complete the Napoleonic record, or to vindicate the truth of history, or for other personal, political or social considerations; and should contrive to start and afterward connive at the continuance of an insular insurrection; thereupon, declare France neutral, and the insurgents belligerents; and then let loose from neutral France, ships and cruisers, in the name of the insular insurgents, to prey upon British commerce: would England deem it quite kind and just in France, her present ally though her former foe, thus to precipitate the partial destruction, if not total annihilation, of the merchant marine of Great Britain, before her whole 474 public ships were permitted to afford suitable protection?

These hypotheses may be significant, and possibly instructive. What has been, may again occur. History often repeats itself: and England even may be admonished, without offense, to learn from the past that, in

the long run, justice, good faith, fair dealing, frankness, fidelity, candor, and honor, do more to elevate than to depress a nation. These qualities are virtues which exalt a state to a lofty position. In no state, where these virtues have a prevailing influence, is the integrity of that state questioned or its honor suspected. And although a state may justly pride itself upon its good faith and national honor, yet it will never be compelled to prove its consistency, or to defend its integrity by chicanery or technicalities.

Even now, an open, manly, frank, and sincere avowal to do justice by John Bright (that type of an English representative commoner), would go far to remove animosity, restore amicable relations, point out the way to a just and honorable adjustment of all differences, and render the future of the two nations radiant with the promise of peace and reality of growing prosperity. Nothing could more aggrandize England, or elevate her in the eyes of neutral nations. Let all former modes of arbitration, mixed commissions, umpires, and referees be dispensed with, as no longer admissible modes of settlement.

Russia is America's friend. For that, and many other historical reasons, England would not select or assent to the selection of the Russian Emperor, as umpire or arbitrator. France is England's present ally, and imitated England in according to the South belligerent rights. The United States could not, therefore, and would not agree to abide the decision of the French Emperor, as referee, arbitrator, or umpire of a mixed or other commission. Prussia is honored with a most able Prime Minister in Bismark, who might have a commanding influence over his sovereign. But the King of

Prussia is allied by marriage to the royal family of England, and might possibly be reached by subtle influences, in spite of the high honor, sagacity, good sense, and diplomatic skill and learning of even the most conspicuous Premier in Europe. In whatever direction, therefore, jurists, publicists, or diplomatists may turn their attention for arbitration, some difficulty will inevitably beset them in making a suitable and sagacious selection of an indifferent arbiter.

Therefore, the better way would seem to be for a direct consultation to take place between the parties, without any intermediation; both resolved to do their utmost to effect an adjustment; and neither desiring to display skill in avoiding a practical solution, or indefinitely postponing it.

From the events of history, it is manifest that the dubious conception of the nature and extent of neutral rights and duties springs rather from a want of experience by ministers and magistrates in their assertion and discharge, than from any uncertainty or instability in the principles whereby those rights and duties are regulated.

It has chanced that the consideration, discussion, and decisions upon belligerent rights and neutral duties, has commonly devolved upon those belligerents, who, in case of a maritime war, were not unlikely to be involved as participants in it, either *bello flagrante vel bello imminente*. This has been eminently the good or bad fortune of England. To this fact may be traced the cause of those arbitrary interpretations, adapted if not designed to mould and modify the public law to suit her precise wishes, wants, and interests. The result has been to produce confusion in her code, and instability

in her conduct, as a neutral state. So novel is it for England to be neutral, that it is positively embarrassing for her statesmen to remain inactive during a maritime war. The situation is so strange and anomalous, that her awkward deportment fitly corresponds with the situation, betraying itself in arbitrary interpretations or technical misconstructions; both of which are infallible symptoms of recklessness or restlessness in a non-combatant.

The Foreign Enlistment Act, in its provisions, is prohibitory; designed to restrain and not to license. The Queen's proclamation was, in form, framed for a like purpose. It is, in no sense, an authorization; but a general interdiction to her subjects and servants within the realm. Neither of these measures were intended to authorize or encourage or permit unneutral conduct or hostile intervention. All such effects may be ascribed directly to the misconstructions of magistrates, or to the arbitrary interpretations of ministers.

Neutrality is not merely a name; but it is a political predicament, in which a nation may be placed without any formal act on her part, or by her own voluntary and superfluous declaration. Rightly regarded, neutrality means peace. When all nations are neutral, then peace is universal. The advent of war necessarily disturbs this pacific attitude of the nations toward each other; converts some into belligerents, and thereby incidentally exposes neutral commerce to depredation and danger. Whoso, therefore, disturbs the peace of the world, ceases in good faith to be truly neutral. War is ever an extreme measure; the "*ultima ratio*" of kings, the last resort of good sense among men. It should never be caused by a capricious partisanship; and very

seldom is it brought on by a want of national good faith. But whenever such an anomaly does occur, the wrong is rarely forgotten, and never forgiven, without reparation. Bad faith becomes a lasting reproach to any people, rendering their sincerity forever equivocal. "*Punica fides*" lives in history to the discredit of the ancient Carthaginian. The French have fixed and fastened the cognomen "*Albion perfide*" upon their ancient rival and foe. This stigma, it is hoped, future events may obliterate ; and leave England with no reasonable ground for its continuance, or any similar imputation, even if Russell and Palmerston had done their worst, in her behalf, to deserve it.

Should the parties meet for consultation at any future period, either at Washington or elsewhere, it is expected that they will approach the consideration of existing differences calmly, dispassionately, and without egotism or arrogance. It is now a matter of business solely.

Possibly, Lord Russell, by his arrogance, has done more to damage England, and plant a thorn in the side of America than all other men, except his departed Premier. If England be wise, Englishmen sagacious, or John Bright remain as sensible in office as out of it, he may eradicate the thorn which Lord Russell wantonly implanted.

When the Foreign Secretary's attention was officially called to the necessity of further legislation for enforcing the Enlistment Act and royal proclamation, it may be remembered that his reply was in substance, that England was the guardian of her own honor, and did not legislate at the dictation of another power. In this mode of reply there was no real dignity ; it was simply an arrogant, insolent, puerile evasion ; and should not be

followed as a model of diplomatic propriety, or sense even. It is, nevertheless, true, that England is the proper custodian of her honor, where others are not concerned and she is clearly right; but it is not so, where other nations are concerned, and England, as one of the family of nations, happens to be wrong: and this view discloses in Lord Russell the infirmity of the man, and, at the same time, reveals the insincerity of the minister.

International law, *ex necessitate*, supersedes the municipal law, because the principles of the former contain the condensed good sense of nations, to which the latter must yield. Those principles were adopted by the general consent of nations, after having been gathered from known and universal usage. They cannot, therefore, be dispensed with, abridged, or abrogated by any one nation, at its special will and pleasure, without some general consultation or convocation with other nations. Indeed no single nation can capriciously contravene the universally recognized public law. England, then, is not, and cannot be, the exclusive keeper of her honor, whenever the rights and interests of other nations are concerned, and Lord Russell was not quite accurate in his statement, nor felicitous in his expression of it. His vain-glory or defiance was not consistent with that comity and respect which are proverbially due to the accredited representatives of other nations. In this aspect, it was certainly impertinent and constructively insolent: for it is, or ought to be, plain to the veriest tyro in politics or diplomacy (the much abused word "statesmanship" is purposely omitted), that no nation of itself, however puissant as a power, can arbitrarily import novel doctrines into the international code,

without previous conference or consultation with other nations alike entitled to such comity and respect.

England alone could not prescribe the four articles contained in the Paris Convention of 1856, for France ; nor could both France and England together prescribe them for Russia ; nor all three for the rest of Europe ; nor all Europe for the United States and the rest of the world, without diplomatic preliminaries. Novel or modern practices may indeed, by lapse of time or general usage, become principles, and be established as such.

But in changing the rights and duties of neutrals, no novelties can be established by mere arbitrary interpretations, which are but an index and mirror, to point out and reflect selfish views and aims.

The legal idea of a neutrality had its origin with the Peace of Utrecht in 1713. During the Middle Ages, maritime capture was but promiscuous and indiscriminate warfare upon the ocean. Privateering of that period was substantially piracy ; and only modified, and somewhat mitigated, gradually, down to 1780 ; when Russia, Prussia, Denmark, and Sweden leagued together and armed, to protect private property from maritime capture. Historians designate this combination as the "First Armed Neutrality." The object was, and such would have been its effects, had it been successful, to mitigate the evils of war by transferring its burthens from the subject to the sovereign, or from the citizen to the state ; and thus ultimately to pave the way to the entire extinction of maritime capture of private property, and to the final abolishment of privateering as well as piracy.

Then followed the French and English wars from

1793 to 1815, and that of the United States from 1812 to 1815 ; during which time no salutary or effectual advance had been made, in a national point of view, either to extend neutral rights or to impose neutral duties.

In 1823-4, however, by a public mitigation of captures, or favoring that policy, the United States, through Messrs. Adams, Rush, and Monroe, substantially and authoritatively condemned privateering. And a similar disposition to approve that policy has been subsequently manifested by her representative men in office. Marcy, Secretary of State in 1854, officially proposed to accede to the terms of the Paris Convention, if an additional clause, providing for the extinction of maritime capture, should be inserted therein by the high contracting parties. Overtures of a like description were made by Mr. Cass, in 1859. During this last year, as well as in 1854, some relaxation of the ancient rigorous rule was formally adopted by belligerents in their hostile operations. And, from present indications, it would not be presuming, to anticipate that the next advance would be the final acceptance of the additional article proposed in 1854 by the United States. Such is a brief outline of the progress of Christian civilization in this respect. But no credit can be accorded to those states, who have actually revived the antiquated practice of ocean piracy ; or who, by an insincere declaration of neutrality, have practically encouraged its revival, either by not faithfully observing, or by technically evading, their sovereign's public declaration.

In the *Huntress*, 6 Ch. Rob. 111 (Sept. 11, 1805), it was judicially laid down as English law, that great respect was due to the declaration of a government of a

state : to doubt the truth of such declaration would be a breach of that comity and respect due to the declaration of an independent state.

In the *Herstelden*, 1 *ibid.* 114 (July 17, 1799), the political identity of sovereign and subject had been previously established by Sir William Scott ; and the subject or citizen was deemed, theoretically, to be bound up in the acts of their *de facto* or responsible government.

But to no foreign tribunal were the subjects of England amenable, while acting under the order of their sovereign. For any violation of neutral rights there is a twofold remedy : —

1. By an appeal to the sovereign ;
2. By a resort to arms.

This is the law of England as established by its highest legal authority on questions of international law.

In *Maissonaire v. Keating*, (2 Gall. 334), authority may be found for a similar doctrine in the United States. In the case of the *Caroline* (*supra*), the doctrine was even extended in its practical application ; for *McLeod* was never brought to trial, though arrested and indicted in New York ; the British Government having interposed and assumed the act, thereby avowing itself politically responsible.

So, if the United States Government now intercede, and assume the payment of the individual losses incurred in its national war ; then, that government becomes legally and equitably, as well as politically subrogated as the party to prosecute the entire claim of its suffering citizens, and its own also. This may simplify the proceeding, and render the matter less complex, so

that even Lord Russell might be able to perceive that there was, after all, both equity and law in favor of the American claims, according to the precedents and practice of England and the United States.

The Queen's declaration was received with all due deference, and regarded with comity and respect. It was presumed to have been made in good faith, on her part. It was the imperative duty of her ministry to take special care that it was duly observed also with good faith by all her subjects and servants. Many of her subjects, however, openly disregarded her injunctions ; and some of her servants defiantly boasted of their intentional remissness, and even indisposition to enforce her injunctions. In August, the sovereign, perhaps jealous of her prerogative, or suspecting her servants' fidelity, thereupon enjoined on the executive government the strictest impartiality as neutrals. If faithful, that government then had the power to suppress and check all unneutral acts within the realm. If it omitted so to do, then such omission was either intentional or accidental. If accidental, then the minister was culpably negligent : and if intentional, then the minister was confessedly criminal. In either view, the omission to check or suppress any breach of neutrality within the Queen's dominions, was a ministerial and therefore criminal mistake ; for any administrative blunder is proverbially criminal.

Nevertheless, all crimes have two ingredients ; intent and act, or *animus* and *factum* ; both of which must concur to completely constitute the *delictum*, either in interpreting the municipal or international law. To consummate the *delictum*, as it may be termed, in interpreting international law, or *crimen*, in construing muni-

cial law, there must be a concurrence of both intention and overt act.

The time of issuing the proclamation was but part of the national offense ; and indicated only the *malus animus* of the minister who advised and prepared that incipient measure. By that alone, the *delictum* would have been incomplete. But this inchoate act conduced, when followed up by subsequent acts of omission or commission by the English Cabinet, to complete and consummate the great national crime, producing the national loss for which reparation and compensation is being sought by the United States against Great Britain. Omission to prevent departure of cruisers from English ports, when prevention was practicable, was equivalent to permission for them to escape on their mission of mischief and destruction against American commerce.

One word from the English Foreign Secretary, seasonably uttered, would have checked this stupendous mischief ; vindicated the good faith of his sovereign ; saved to England her credit ; and, to the United States security from loss. The utterance of that one official word was omitted : the *factum* and *animus*, concurring, together therefore constitute the wrong. And Lord John Russell, who had the power, if he were disposed to exercise it, to stop the Rebel cruisers from issuing from English ports, must hereafter be the pillow for his country's regrets, and the maledictions of neutral nations ; while his official delinquencies must forever constitute the real legal ground for the Alabama and other similar claims.

It is, therefore, hoped and expected that Gladstone, Clarendon, Argyll, Cardwell and others, as former colleagues of the late Foreign Secretary in the Palmerston

Cabinet, may cease to sympathize with the shelved ex-Secretary ; meet the question of the times, fairly and squarely ; being disposed and determined voluntarily to right the wrong, reaffirm their sovereign's good faith, disabuse the nation of any imputation of perfidy, by seeking to repair the injury done to a neutral and friendly state, with which England was and long had been at peace.

Other English authorities may be cited : as, *The Haabat*, 2 Ch. Rob. 174 ; *The Twee Gebroeders, Alberts*, 3 *ibid.* 162 ; *The Twee Gebroeders, Northolt*, *ibid.* 336 ; *The Madonna del Burso*, 4 *ibid.* 169 ; *The Narcissus*, *ibid.* 17 ; *The Bremen Flugge*, *ibid.* 90 ; *The Rendsborg*, *ibid.* 121 ; *The Vrow Anna Catharina*, 5 *ibid.* 15 ; *The Anna*, *ibid.* 373 ; and *The John Patrick*, *ibid.* *n.* 381 ; *The Resolution*, 6 *ibid.* 21 ; *The Purissima Conception*, *ibid.* 45 ; *The Huntress*, *ibid.* 104 ; *Edw.* 184, *The Speculation* ; 1 *Dods.* 104, *The Drummond* ; *ibid.* 245, *The Eliza Ann* ; *ibid.* 413, *The Diligentia* ; 2 *Dods.* 451, *The Prins Frederick* ; 3 *Hagg.* 289, *The King v. 49 Casks of Brandy*.

Other American cases also may be cited : *The William*, 1 *Pet. Adm.* 12 ; *Moxon et al. v. The Fanny*, 2 *ibid.* 309 ; *Darby v. Easton*, 2 *Dall.* 34 ; *The Experiment*, *ibid.* 42 ; *United States v. Peters*, 3 *ibid.* 121 ; *Talbot v. Janson*, *ibid.* 133 ; *M'Donough v. Danery*, *ibid.* 188 ; *Moodie v. The Phoebe Ann*, *ibid.* 319 ; *Talbot v. Seeman*, 1 *Cr.* 1 ; *Murray v. The Charming Sally*, 2 *ibid.* 64 ; *Jennings v. Carson*, 4 *ibid.* 2 ; *The Venus*, 8 *ibid.* 253 ; *The Brig Alerta and Cargo v. Moran*, 9 *ibid.* 359 ; *The Nereide*, *ibid.* 388 ; *The Liverpool Packet*, 1 *Gall.* 513 ; *The Commercen*, 2 *ibid.* 261 ; *The San Jose Indiana*, *ibid.* 268 ; *Maissonaire v. Keating*, *ibid.* 325 ; *The Arabella*,

ibid. 368 ; The Flying Fish, ibid. 374 ; The Betsey, ibid. 377 ; The Antonia Johanna, 1 Wheat. 159 ; The Invincible, ibid. 238 ; The Commercen, ibid. 382 ; The George, ibid. 408 ; Dos Hermanos, 2 ibid. 76 ; The Freundschaft, 3 ibid. 14 ; The Atalanta, ibid. 409 ; The Anne, ibid. 435 ; *Olivera v. Union Ins. Co.*, 4 ibid. 193 ; The Estrella, ibid. 298 ; La Amistad de Rues, 5 ibid. 385 ; The Bello Corunes, 6 ibid. 152 ; La Concepcion, ibid. 235 ; The Santissima Trinidad, 7 ibid. 283 ; and The Santissima Trinidad, 1 Brockenb. 478.

Now, having cited the authorities, presented the legal doctrines, and examined also the political views, which, at the present time, seem to be applicable in discussing either a general neutrality, or, under a declared neutrality, any alleged violation of neutral rights of a particular friendly nation, it is difficult to refrain from expressing both a sincere wish for a complete and final settlement of these national differences, and likewise a confidence that such a result is feasible. Having given the subject some thought and no little study, from a neutral point of view, the writer is persuaded, that there is no insuperable obstacle in the way of a seasonable and amicable adjustment. To accomplish so desirable an end, it would not, indeed, be wise to confide its negotiation and management to another Lord Russell. On the part of England, the more masterly method, and so her most sagacious movement, would be, to commission John Bright to proceed to Washington as ambassador, with plenary powers to arrange and adjust the Alabama and similar claims : or, in case any personal or political considerations specially forbid that particular selection, then, in the interest of peace, to substitute and depute some similar legate, with like

powers, in behalf of Great Britain, to close the business. That done, the work, at the start, would be more than half accomplished ; and ultimate adjustment, though a thing assured, would thereafter remain only a question of time. And, not to overlook the manly and independent bearing of Lords Stanley and Clarendon, this first official step, taken openly, would go far to disarm prejudice, and extract from the national heart of America that thorn so perversely implanted, through Mr. Adams, by Lord Russell. *Hæret lateri lethalis arundo.*

The wound caused to the Queen by the early removal of the Prince Consort during Palmerston's Premiership, could not have been deeper than was that inflicted upon the United States by the Foreign Secretary, Russell ; a minister of modern times who, not having kept pace with the advanced amelioration of public law, has shocked the moral sense of the neutral world, no less by his puerile, yet defiant and sulky duplicity toward the United States, than by his clandestine and surreptitious perfidy toward his sovereign and bereaved Queen.

Public men should not forget that royal families may have strong affections, filial, conjugal and paternal, which will not permit them or any of their members to forgive an act of treachery or deceit. If the Queen's chosen seclusion be inexplicable, so are other matters. Wherefore the sovereign's early distrust of her minister's fidelity ; or her awakened suspicions at Albert's death ; or why was the Premier's presence in the same room so unendurable to his Queen ; whence the gushing gratitude of members of the royal family for the few kind words of John Bright ; why Bright is, and Russell is not now a Cabinet minister ; why do the Tories taunt

Gladstone with belonging to the Bright Cabinet ; why, after Albert's decease, did secession influence become dominant in Downing Street, and Rebel cruisers escape from English docks and harbors, without molestation or restraint ? All these, and other unsolved queries are indeed, at present, historical enigmas. Solve them now, or let any student of history rise up and remove, if possible, the mystery from the Man in the Iron Mask, then may the secret of the Queen's seclusion, and the wrongs of the United States, be fully revealed.

While the minister's personal motive or inducement for duplicity of conduct concerns not the claimants ; yet the *animus* betrayed by him officially in acts of omission, or implied by overt acts of commission, contribute essentially to constitute the gist of the national offense and injury complained of.

Neutrality then, as has been seen, may be general or natural, as contradistinguished from a particular or declared neutrality. *A declaration of neutrality, unless for special reasons*, is a wholly superfluous act ; and had better be omitted. The true neutral is and remains neuter, without making any declaration ; while, by making it, specific duties may be thereby imposed or are voluntarily assumed, the non-observance of which might subject the declaring state to the suspicion, and possibly to the just imputation of bad faith.

In matters of prize, the legal effect of a condition of war should be thoroughly comprehended. The relations of neutrals and belligerents should be familiar to those who appear in prize courts. In England, this is pecu-

liarily true, as the doctors of the civil law make that business a specialty. He, therefore, who in the United States proposes to practice in prize courts professionally, should make himself complete master of the great principles of international law, if he desire to render his practice profitable to himself or useful to the court or his clients.

First. He should accurately understand, how persons or property are affected generally by a state of war, during the existence or continuance of hostile relations :

Second. Also the national character of neutrals and belligerents, in order the better to define their precise duties and rights, in reference to persons and property, as affected by an assumed condition of neutrality :

Third. To what extent, by a just exercise of the war rights of visitation, search, and detention, belligerents may seize and confiscate persons and property, during war :

Fourth. When and how far, by instituting a blockade, belligerents may prevent neutrals from interfering in a war, either for individual gain, or with intent to aid and comfort a belligerent enemy :

Fifth. What may be deemed contraband of war ; and where the right to seize articles, things, or persons, as contraband, may be lawfully exercised :

Sixth. When belligerent rights may be so waived, as to grant and issue licenses lawfully ;

Seventh. Or so relaxed as to ransom and redeem persons or property :

Eighth. When recapture is effected under such peculiar circumstances, as to entitle the captor to salvage ; and,

Ninth. How and upon what principles of statute,

municipal or international law, prize courts may adjudicate, and condemn or acquit as prize; and, on condemnation, decree among the captors distribution of prize money.

These are matters for the judicial determination of prize courts, within their special jurisdiction; and should, therefore, be familiar to professional gentlemen, assuming to practice in such courts, if they desire either to do themselves credit or to be useful to those courts.

Having stated the substance of what originally seemed to be pertinent to be said on Prize generally, this treatise will now be concluded by subjoining the following

SUGGESTIONS FOR GENERAL DIRECTIONS TO GUIDE, IN SUDDEN EMERGENCIES, THE OFFICERS OF THE NAVY OF THE UNITED STATES.

The foreign relations, through treaties, subsisting between this and other states, may be ascertained by consulting those treaties now in force.

The United States have entered into treaty stipulations with the following nations, namely: Great Britain, France, Russia, Prussia, Austria, Spain, Italy, Netherlands, Portugal, Switzerland, Norway, Sweden, Denmark, Turkey (Ottoman Porte), North Germany, Naples, Algiers, Tripoli, Tunis, Morocco, Hanseatic Towns, China, Japan; the South American Republics — Chili, Peru, Colombia, Venezuela, — Brazil, Central America, Mexico.

The customary Articles inserted in Treaties are:—

1. The peace and amity clause.

2. The most favored nations clause.
3. Mutual benefit of trade and residence assured clause.
4. Equalization of duties on vessels and cargoes clause.
5. Characteristics of national vessel clause.
6. Imports and exports on reciprocal footing clause.
7. Respective citizens of each to manage their affairs clause.
8. No detention of vessels without indemnification clause.
9. Asylum and refuge to respective parties clause.
10. Captures by pirates to be restored clause.
11. Mutual assistance in shipwreck to be rendered clause.
12. Disposition of real and personal estate clause.
13. Protection afforded to persons and property clause.
14. Liberty of conscience and right of burial clause.
15. Flag reciprocally to protect property and persons clause.
16. Naturalization or,
17. Citizenship clause.
18. Neutral property, under enemy's flag, seizable clause.
19. Freedom of trade and commerce in all but contraband goods clause.
20. Mode of proceeding, in case of contraband found clause.
21. Blockade clause.
22. Visitation and search at sea clause.
23. Sea-letters, etc., to be supplied in war clause.
24. Vessels under convoy to pass on word of commander clause.

25. Prize courts only to adjudicate prize questions clause.

26. No letters of marque to be issued from enemy clause.

27. Merchant's privileges in case of war clause.

28. Debts not confiscable in case of war clause.

29. Privileges of public ministers clause.

30. Consuls received, upon exhibit of credentials clause.

31. Consul's privileges clause.

32. Apprehension of deserting seamen clause.

33. Consular convention to be formed clause.

34. Duration of treaty — term ten or twelve years clause.

In 1817, March 1st, the United States inaugurated its own commercial system, based upon a perfect reciprocity; whereby vessels of foreign nations were to enjoy the same privileges and immunities as American vessels.

By mutual treaty stipulations, such privileges were accorded to Russia, Sweden, Norway, Denmark, Prussia, Netherlands, Belgium, Hamburg, Bremen, Lubec, Sardinia, Genoa, Austria, Venezuela, Oldenburg, Central America, Muscat, Greece, Mecklenburg, Schwerin, Turkey, Peru, Bolivia, and Granada.

To Mexico, Colombia, Brazil, Chili, was accorded, for their vessels, the same tonnage duties as on American vessels; the same duties on British vessels from Europe as on American vessels; and none at all were imposed or to be exacted from Portuguese and Spanish vessels.

After the general adoption of the United States commercial system of reciprocity, power was given to the President, in 1823, to suspend or discontinue discriminating duties on all foreign vessels, provided none were

imposed by their respective governments on American vessels.

And this led ultimately to the practical abrogation of the British navigation laws, first enacted by Cromwell, adopted by Charles, and continued until May 12, 1826, when Mr. Huskisson made his masterly and candid statement concerning these laws; and which was approved by Lord Liverpool, to the effect, that they were designed originally,—

1. To stimulate the industry of the country by the fisheries.

2. To secure the coasting trade of the British Isles.

3. To secure the European trade.

4. To secure the Asiatic, African and American trade; and,

5. To secure the British colonial trade in her distant possessions; and this fair exposition by Mr. Huskisson led at once to a modification; circumstances then justifying and requiring a change.

In order to enable naval commanders and other officers to perform their duties as representative belligerents, strictly and intelligently towards neutrals, in time of war, the following suggestions are offered, in the shape and form of general provisional directions; and which, if sanctioned and adopted by the proper authority, would render the line of conduct, to be pursued by naval officers towards neutral ships, as easy as plain sailing:—

First. Officers of a belligerent state, on the breaking out of war, should forthwith make themselves familiar with the cause, object, and purpose of the war, especially in reference to the parties engaged in hostilities; unless they should be seasonably informed thereof by special official instructions.

Second. Such officers should particularly inform themselves of the precise relation which each belligerent holds in regard to neutral nations generally ; or toward any particular neutral nation, especially if it be a commercial or maritime power.

Third. They should, at an early day, provide themselves with the best and most authentic means of studying the general rules and principles of international law, applicable to the existing political relations of their own country toward all other powers, friendly or neutral, allies or belligerents, if likely to be involved.

Fourth. In the absence of all special instructions, they should make themselves masters of the municipal regulations and general policy, likely to be prescribed or about to be pursued by each belligerent, as well as the avowed position or policy intended to be taken and pursued by neutrals.

Fifth. They should carefully peruse the treaties existing between the belligerents, and duly ascertain how far hostile relations may have qualified, suspended or abrogated all or any specific articles which are contained in such treaties.

Sixth. They should also ascertain and well understand, to what extent existing treaties between nations, neutral or not hostile, may be qualified, suspended or abrogated, or have virtually qualified, suspended or abrogated any of the general rules of international law.

Seventh. They should prescribe for themselves, what may be the most prudent general course of conduct to be pursued on the high seas, in case of the interception of neutral vessels, for arrest, visit, or search ; or of belligerent vessels for the purpose of seizure or capture as prize of war.

Lastly. They should be entirely familiar with paragraphs 728 and 729 (Article 15th) of the "Regulations for the Navy of the United States;" and indeed with that entire article, as prepared and printed in 1865, for the Navy Department, as well as all subsequent additions, alterations, or amendments, whether made by the Department itself or by Congress. *Vide* p. 127.

By observing the foregoing suggestions, whether regarded as rules and guides of conduct or however otherwise viewed, the belligerent commander may studiously and intelligently refrain from complicating or compromising the relations of his own state with other nations, living on terms of political and commercial amity and friendship with it.

Such and so great is the power generally conferred upon naval commanders, that it is quite easy for any, under a patriotic impulse, or through some incautious, unguarded indiscretion, to seriously involve their own country in hostile relations with another state, hitherto on friendly terms; and perhaps force upon their own government the unpleasant and mortifying necessity and duty of disavowing such conduct, and possibly making pecuniary reparation or official apology therefor. This undesirable imbroglio may be avoided by a timely attention to the general preliminary suggestions already made.

But, in order to guard more effectually against an hasty or indiscreet course of action, prompted by an impulse of patriotism, or arising from an excess of zeal to serve faithfully his country or to worthily secure for himself an honorable name in his profession, the naval commander should well observe the four principles incorporated into the law of nations by the European

powers generally at the Convention of Paris, April 16th, 1856, which are: —

First. Privateering is and remains abolished.

Second. The neutral flag covers enemy's goods, except those which are contraband of war.

Third. Neutral goods, under enemy's flag, are not liable to capture, except those contraband of war.

Fourth. Blockade to be binding must be effective; that is, maintained by a force sufficient to prevent access to the coast of the enemy.

Although the Convention was at first signed by several only of the leading powers by their representatives at Paris, yet many of the other European states have subsequently become parties to the Paris Convention by acceding to its terms.

The United States not having become a party to the stipulations of the Convention of Paris in 1856, a careful consideration of her foreign relations as found existing and reflected by different treaties, and reported in judicial decisions in matters of prize, becomes both an imperative and indispensable duty of the American naval commander.

Aside from the principles stipulated for by the high contracting parties, in 1856, still further suggestions, arising entirely from antecedent treaties of the United States with other states, may be here usefully inserted.

England, as a commercial state, and the French, as a warlike as well as commercial people, by their collisions and conflict at arms prior to 1812, greatly restricted the commerce of the United States, and seriously crippled its merchant shipping interests, more especially in the carrying trade. But after the peace of 1815, the United States effected, by negotiation, treaties with

the South American Republics, the Barbary States, and the Asiatic and European powers, whereby her commercial relations were very materially improved with all civilized foreign states of the world.

Gradually, belligerent rights became ameliorated, and belligerent duties modified and qualified by the treaty stipulations thus entered into; so that the principles settled and established by the Convention at Paris in 1856 for the European powers had been separately recognized in the main by the United States and were thus practically adopted long before, to a certain extent, the assembling of that Convention. And it is no exaggeration to declare that this country, therefore, if it did not necessitate, certainly did anticipate that important international act, without formally engaging in any "entangling alliances," offensive or defensive, with European or other Foreign powers.

In the wars following the French Revolution, during the French Republic and under the Empire, when Napoleon was struggling for his "continental system" as against the naval power of England, and also during the war of 1812, much transpired in the prize courts of this country and England, which had the effect to define, expound and simplify the rules of international law touching neutral and belligerent rights and duties.

Our war with Mexico, the Russian war in the Crimea with Turkey and her allies, France and England, and the American Rebellion, have also contributed materially to further settle these rights and duties.

And now, by reason of these various national conflicts, the contributions of text writers, and the accumulation of judicial decisions, evoked during the past three quarters of a century, the rights reciprocally accorded

to and claimed by commercial and other nations are, measurably, definitely settled and distinctly defined. In future, it may be deemed inexcusable in American naval officers, of the higher grade, to hereafter fail of being masters, not only of discipline, but of diplomacy ; competent not only to fight bravely, but to write warily in their country's behalf, and sufficiently versed in international law to enable them to avoid mistakes, either in making seizures or intercepting vessels, for visitation or search ; in short, so that they may confidently claim and assert all that is clearly right, and, as firmly and heroically, resist whatever may be clearly wrong.

Thus prepared, the officers of the American navy, by the aid of special official instructions or help of some well-arranged general manual, not too elaborate nor yet too succinct, may, on all occasions, be enabled to discharge intelligently all their respective duties to their own country and to other sovereign powers, whether allies, neutrals, or belligerents.

The wonder is, that the navy department has not already anticipated this imperfect attempt to supply such a want. Long since, Congress authorized the performance of such a service ; and by a joint resolution passed March 3, 1863 (No. 24, p. 823), provision was expressly made for the appointment of a commissioner to revise and codify the naval laws, and report such revised code to Congress at its next session. Neither such a code nor any report has yet been made public ; although, at the time of the passage of the resolution, the service in this respect was promptly offered to be performed, with or without compensation, as is well known to the writer.

Now, after more than four years' delay, this outline

has been prepared as what might have then served as a fitting supplement to such revised code, had that work been performed at the instance of the government.

All articles of treaties with foreign nations should be generally familiar to naval commanders of stations, fleets, squadrons, or single ships; but especially, those clauses relating —

1. To the right of visit, search, and detention;
2. Intercepting generally at sea of neutral vessels;
3. The mode of boarding, under or without conveyance;
4. Blockade, its imposition, warning off, notice, and termination;
5. Characteristics of national vessels;
6. Rights of "most favored nations;"
7. Non-detention of vessels without indemnification;
8. Right of asylum and refuge;
9. Restoration of piratical captures;
10. Reciprocal protection by flag of persons and property;
11. Enumeration of contraband articles;
12. Liability of neutral goods, under hostile flag;
13. Freedom of trade and commerce, with restriction as to contraband goods;
14. Proceedings on finding contraband goods;
15. Possession of regular ship-papers or their absence;
16. Confiscation of debts;
17. Merchants' privileges in case of war;
18. Consuls' privileges;
19. Public ministers' privileges;
20. Consul's reception on exhibit of credentials.

Perhaps also, other clauses should be noticed by American naval officers, according to their particular

local station, or cruising ground, the character of their command and nature of their special instructions from the Navy Department; upon which it devolves as a duty ever to anticipate the exigencies and wants of all commands, whether cruising, stationed, or convoying vessels, transporting troops, provisions, or munitions of war.

If precise and positive instructions cannot be seasonably prepared, then provisional general directions should be framed for all possible contingencies, and kept on hand by the Navy Department for sudden emergencies. Indeed, no expedition should be ordered, unless well and duly considered beforehand, and every preliminary step taken that may be requisite to insure success, however suddenly it may have been conceived or hastily got up.

After starting, the chief in command of the expedition, be he admiral, vice-admiral, rear-admiral, commodore, captain, or commander, should have a well-matured plan for successfully accomplishing it, according to official instructions; committing no indiscretions and violating no international law, nor treaty or other mutual stipulations. And for this purpose, he should fortify himself, in advance, with the best legal advice and the most prudent official hints and counsel.

Powers of Naval Commanders.

1. The powers of a commander of national vessels, in time of war, are ample for making captures; and they should be discreetly used, whether it be in the exercise of the right of approach, visitation, search, seizure, interception, or detention merely. He may lawfully exercise all these powers over merchant vessels of any state, except within a neutral's territorial waters

and not within three miles of neutral land; but not, in any situation, over vessels of war, attached to the public navy of a foreign state.

2. But, in the exercise of these rights the utmost propriety of conduct toward the master and crews of other vessels should be observed by the commander himself; and the same should by him be strictly enjoined upon his own officers and crew.

3. If he commit an act not warranted by subsisting treaties, or recognized municipal regulations, or international law, his conduct may become a subject of complaint by another government, inquiry by his own, and perhaps ultimately of reproach to himself.

4. If he detain or intercept a vessel at sea without probable cause, the penal consequences may attach to himself personally, in the shape of costs and possibly of damages.

5. Probable cause is judicially understood to be evidence sufficient to justify suspicion, though inadequate to warrant condemnation, as prize.

6. If any wrong, impropriety, or offense be done to the captured vessel, cargo, or crew, the captors may forfeit all share or interest in the capture, even if both vessel and cargo shall be condemned as lawful prize of war. (New Prize Act of 1864, § 37.)

7. For all wrong-doing, the commanding officer is *ab initio* responsible, whether present or not, if it be done under his command; and this responsibility cannot be shifted from himself to his superior, unless such superior officer were personally present and commanding. (2 Wheat. 340, *The Eleanor*; 1 Ch. Rob. 179, *The Mentor*; 1 Dods. 404, *The Diligentia*; and 2 Dods. 48, *The Actæon*.)

As to Interception and Detention.

1. No neutral vessel, though trading with an enemy, can be lawfully intercepted or detained, unless engaged in carrying articles contraband of war, breaking a blockade, or intending or attempting to break a blockade, the intent or attempt being, in law, a constructive breach or violation thereof.

2. By the states which were originally parties to the Paris Convention of 1856, as well as by those which have subsequently become parties to that international proceeding by acceding to its terms, enemy's goods, though found on board a vessel, are not held necessarily to constitute adequate cause for detaining the vessel or seizing the goods.

3. Americans, though not allowed to trade with an enemy in American bottoms, ought not to be interfered with in neutral vessels, unless detected in committing breach of blockade or trading in goods contraband of war.

What and who may be Detained,

may be thus enumerated : —

Enemy vessels may be detained ;

A cartel vessel, guilty of breach of cartel ;

American or allied vessels, trading with the enemy ;

American vessels, recaptured from the enemy, if started on a cruise, as a hostile ship of war ; and

Any vessel, of any nation, may be detained, either for breach of blockade, carrying contraband goods, resisting search, willfully evading visit, or for concealment, spoliation, destruction, or simulation of ship's papers.

Where a Claim for Joint Capture is possible or probable, the duty of a commander, in reference to a suspected lawful prize, should be performed with precision, under the three following predicaments: —

- (a) When the presumed prize is first sighted;
- (b) During the time of pursuit;
- (c) After the chase is over, and at the time of capture.

1. When sighted, the distance, direction, and course should be duly noted by a competent officer, detailed for that purpose, and by the appointment of the commander; and if other vessels are in sight, their course, direction, and distance should also be noted.

2. During the chase, if the course of the expected prize be altered, a note should be made of the alteration, and the time and manner of the change; also if any other American ship were in sight, or hove in sight during the pursuit, or joined in the pursuit; how far, when and where, and her course, distance, and direction; and now under the modern mode of maritime warfare, whether such vessel or any vessel were within signal distance.

3. At the time of capture, a note should be made as to when and where the prize was overhauled by the actual captor; if any other American vessel were within signal distance or sight; and if so, her distance, direction, and course.

The presumed prize may be pursued under false colors, but not fired upon: *vide* The Peacock, 4 Ch. Rob. 187, where Sir Wm. Scott says: "To sail and chase under false colors, may be an allowable stratagem of war; but firing under false colors is what the maritime law of this country does not permit; for it may be at-

tended with very unjust consequences ; it may occasion the loss of the lives of persons who, if they were apprised of the real character of the cruiser, might, instead of resisting, implore protection."

It is a high-handed act to visit, search, or detain any vessel at sea, if engaged in a lawful trade and peacefully pursuing her voyage ; the exercise, therefore, of either the belligerent right of visit, search, or detention, should be resorted to with great circumspection, and exercised only in cases of grave suspicion and extreme emergency.

In the United States, the customary and material ship papers are as follows : —

- Register,
- Custom-house clearance,
- Crew List,
- Log Book,
- Charter Party (if chartered),
- Invoice,
- Bill of Lading.

Visit for the purpose of search, and search itself, should be conducted by a visiting or boarding officer. After looking over the ship papers such officer should decide, if possible, whether the arrested ship should be further detained ; if not, and he be in doubt, by reason of any circumstance of suspicion or distrust, he should commence a search ; and if this be permitted, he may be assisted by the boat's crew or others from the capturing ship.

While, during the process of search, the utmost latitude of civil inquiry is permissible ; menacing, or intimidating language and conduct should be avoided. (*Vide* United States Prize Act.)

None should be removed from the ship arrested, whether master or other person, without his own consent.

The cargo should be carefully guarded against damage or irregularity during the search ; and if the boarding officer, after a partial search, shall conclude that there is no sufficient cause for detention, he should abstain from all further proceeding ; promptly replace all articles removed ; and at once release the vessel and permit her to prosecute her voyage without molestation.

On the termination of the search, or if it be cut short, the boarding officer should ascertain if any complaint or cause of complaint existed as to the mode of conducting the search, or upon other grounds. If so, it would be well to have it stated in writing. The result of visit, search, or inquiry should also be entered on the ship's log, or boarding book (if any be kept), with all particulars as to time, place, and parties.

Within a reasonable time, full certified statements should be forwarded to the Navy Department and law officers for examination ; and if the commander shall have detailed two officers with the boat, then duplicates should be prepared, one by each detailed officer, to be transmitted to the department.

Detention is justifiable, if there be cause for suspicion ; and if such cause exist, then explanation is permissible. If such explanation be not satisfactory, then permanent detention will ensue as of course.

Beside the absence, spoliation, willful destruction, throwing overboard, suppression, concealment or non-production of important papers, any irregularity or incongruity of ship papers with the master's statements, are good cause for detention.

But irregularities, defects, or inconsistencies in papers merely are not of themselves good or conclusive cause for detention ; provided it shall otherwise appear satisfactorily that the vessel was pursuing a legitimate and inoffensive trade.

Detention of contraband goods, persons, despatches, or vessels, is also justifiable.

1. Contraband goods are described as such in the text books, or so recognized and enumerated in public treaties.

In general, whatever may be of use to a belligerent in war for war purposes is contraband.

2. Contraband persons are soldiers or sailors in the service of the enemy ; military, naval, or civil officers, employed at the public expense and sent abroad.

But ambassadors to neutral countries are not contraband ; nor is their mere presence in neutral ships adequate cause for detention.

The offending vessel's liability dates from the time of her sailing, and continues till the landing of the persons.

If contraband persons are transported, the vessel is visited with the penalty of confiscation therefor ; and the like penalty attaches to the cargo as well as the vessel, provided the same person is owner of both vessel and cargo, or *pro tanto*.

It is no excuse, though a master may be ignorant of the contraband character of his passengers, or even if he be carrying them by duress or compulsion.

But a commander is not allowed to remove contraband persons ; and then release the intercepted vessel and permit her to proceed : for in such case, the vessel should be ordered, with the persons on board, into port

for adjudication, as should have been done with the Trent.

3. Despatches, on board a neutral vessel having a hostile destination, are deemed contraband.

Official communications between civil and military officers, whether important or otherwise, are deemed "enemy's despatches," unless they be communications to a consul or ambassador in a neutral country, which are permissible; being presumed to be pacific, and concerning exclusively the neutral state.

The transportation of enemy officers to neutral governments is also permissible.

4. Neutral vessels, with hostile destination, may be detained as contraband vessels; either when —

- (a) They are used as transports, even by duress;
- (b) Or equipped for war vessels and sold as such;
- (c) Or if destined to the enemy's government to be used for war, whether so fitted or not.

And any vessel, if contraband, is liable to confiscation; and her cargo also, if the same person be the owner of both.

Cartels

may be detained, if they carry cargo or despatches, or presume to trade or traffic; for such employment would be in violation of their respective flags of truce, safe-conduct, or that general immunity which they enjoy while carrying prisoners for exchange. This exchange of prisoners is a modern device for mitigating the evils of war; taking the place of ransom, which also was a substitute for the more ancient Roman practice of reducing prisoners to servitude.

But cartels properly ought to have some pass; and when so protected, they are exempted from detention,

cundo vel redeundo, whether empty or filled with prisoners on board. *Vide* La Rosine, 2 Ch. Rob. 372; The Daifjie, 3 *ibid.* 142; The Venus, 4 *ibid.* 355; The La Gloire, 5 *ibid.* 192; The Mary, *ibid.* 200; The Carolina, 6 *ibid.* 336; The Rose in Bloom, 1 Dods. 60.

Convoy

is defined in the Maria, 1 Ch. Rob. 340; the Sampson Barney, *ibid.* 346 *n.*; the Elsebe, 5 *ibid.* 176; and the Galen, 1 Dods. 429; and the doctrines there established are, that vessels convoyed by an enemy are liable to capture; those convoyed by a neutral have no immunity from the belligerent rights of visit, search, and detention; while resistance to the exercise of these rights or instructions to resist, subject the convoying ship to detention.

A British convoying ship may make captures, or assist other cruisers in making captures, if that can be done without neglecting or exposing the other vessels under convoy.

The general statements in the text, as to neutral territory, enemy vessels, trading with the enemy and blockade, render it superfluous to be more particular upon these subjects.

Sending into Port for Adjudication,

is expressly provided for in the United States Prize Act of 1864, § 1 (Appendix K.)

Usually the port should be selected with reference to distance and the facilities for reaching it seasonably and safely.

By the Convention between Great Britain and France, signed at London, May 10, 1854, it was stipulated that

Russian vessels, captured by either allied power, should be sent "to the nearest port belonging to the power whose flag it carried."

The Duties of Prize Masters

are many and various. With the master's aid, he should make a complete inventory of everything on board the supposed prize; enter in the log all changes; carefully and directly navigate her inward; secure a pilot; seal up the hatches; guard against recapture; prevent embezzlement; and preserve the cargo from injury or spoliation. But *vide* United States Prize Act, § 1.

Necessity alone would justify removing the master or supercargo; but if such necessity exist, he may remove the crew and master too.

But all this should be made a subject of precise and provisional instructions, in advance, by the Navy Department; unless such portions thereof as may be already embodied in the United States Prize Act of 1864.

CONCLUSION.

Thus, in conclusion, has been executed the original plan of the present treatise; not so successfully as could have been wished; but yet as well as the author's restricted means, limited private library, command of time, and ability for labor would permit.

The plan had the approval of a highly distinguished professional friend and correspondent, in his life time, and before its execution was commenced; and should the execution measurably accord with the approved plan, the author will be abundantly satisfied.

As to pecuniary compensation, that, according to the general depressing voice of the profession and publishers, was not to be expected.

If there be any merit at all in the present work, that, of course, will belong to him who is entirely responsible for all its faults and imperfections.

In order to produce a law book, which may be both useful and readable, any success in such an undertaking, however limited, must be attributed as much to the arrangement as the execution.

The division into Two Parts, in one volume, was adopted to keep the instance and prize courts and cases as distinct as possible.

The First Part, as has already been observed, was written in separate chapters, and each chapter devoted to distinct subjects, in order to facilitate the student's reference thereto for any particular inquiry.

The Second Part is devoted more exclusively to prize law, practice, and proceedings; treating generally and fully of blockade; the war-rights of visit, search, and detention; belligerency; neutrality, general and declared; incidentally, of the Alabama and similar claims; enemy property, contraband goods, persons and dispatches; neutral territory and other topics connected with or collateral to prize; and closing with some general suggestions for the good and government of naval commanders, in cases of emergency; all drawn from reported cases, decided by the courts of Admiralty.

Throughout, it has been deemed to be of paramount importance, to derive from the original sources rather than from text books of whatever value, all the *dicta* and doctrines here recorded. And to this end, the Admiralty reports have been freely resorted to; while the

many valuable text books have been but sparingly consulted.

Perhaps a different course, in this respect, would have been convenient, and might have proved more profitable. I am not sure that it would not be so; but it would not have been in accordance with the original plan, to which I have steadily adhered. D. R.

SALEM, MASS., No. 21 *Winter Street.* May 20, 1869.

APPENDIX.



APPENDIX.

APPENDIX A, page 7.

JUDGES OF THE UNITED STATES SUPREME COURT.

Names.	Residence.	Appointment.	Decease or resignation.
John Jay, C. J., . . .	N. Y.	Sept. 26, 1789	May 17, 1829
John Rutledge, . . .	S. C.	Sept. 26, 1789	July 1800
William Cushing, . . .	Mass.	Sept. 27, 1789	1810
Robert H. Harrison, . .	Md.	Sept. 28, 1789	1790
James Wilson,	Penn.	Sept. 29, 1789	1798
John Blair,	Va.	Sept. 30, 1789	Aug. 31, 1800
James Iredell,	N. C.	Feb. 10, 1790	Oct. 20, 1799
Thomas Johnson, . . .	Md.	Nov. 7, 1791	1819
William Patterson, . .	N. J.	March 4, 1793	1806
John Rutledge, C. J., not confirmed by the Senate, }	S. C.	Dec. 10, 1795	July 1800
Samuel Chase,	Md.	Jan. 27, 1796	June 11, 1811
Oliver Ellsworth, C. J.,	Conn.	March 4, 1796	Nov. 26, 1807
Bushrod Washington, .	Va.	Dec. 20, 1798	March 9, 1829
Alfred Moore,	N. C.	Dec. 10, 1799	Resig'd, 1810
John Jay (again C. J., but declined), }	N. Y.	Dec. 19, 1800	May 17, 1829
John Marshall, C. J., . .	Va.	Jan. 27, 1801	July 6, 1836
William Johnson, . . .	S. C.	Mar. 24, 1804	Aug. 4, 1834
Brockholst Livingston, .	N. Y.	Nov. 20, 1806	1823
Thomas Todd,	Ky.	March 2, 1807	Feb. 7, 1826
Levi Lincoln, { both de-	Mass.	Jan. 3, 1811	April 14, 1820
John Q. Adams, { clined.	Mass.	Feb. 22, 1811	Feb. 23, 1848
Joseph Story,	Mass.	Nov. 18, 1811	Sept. 10, 1845
Gabriel Duvall,	Md.	Nov. 18, 1811	March 6, 1844
Smith Thompson, . . .	N. Y.	Dec. 9, 1823	Dec. 15, 1843
Robert Trimble,	Ky.	May 9, 1826	1829
John McLean,	Ohio,	March 7, 1829	April 4, 1861
Henry Baldwin,	Penn.	Jan. 6, 1830	April 21, 1846
James M. Wayne, . . .	Geo.	Jan. 9, 1835	July 5, 1867
Roger B. Taney, C. J., .	Md.	1836	Oct. 12, 1864
Philip P. Barbour, . . .	Va.	1836	Feb. 25, 1841
John McKinley,	Ala.	1837	July 19, 1852
John Catron,	Tenn.	1837	May 30, 1865
Peter V. Daniel,	Va.	1841	May 31, 1860
Samuel Nelson,	N. Y.	Feb. 14, 1845	

Names.	Residence.	Appointment.	Decease or resignation.
Levi Woodbury, . . .	N. H.	1845	Sept. 7, 1851
Robert C. Grier, . . .	Penn.	Aug. 4, 1846	
Benjamin R. Curtis, . . .	Mass.	1851	Resigned, 1858
Edmund A. Bradford, . . .	La.	1852, nomination	laid over.
John A. Campbell, . . .	Ala.	1853	Resigned, 1861
Vacancy.		1857	
Nathan Clifford, . . .	Me.	Jan. 12, 1858	
Vacancy.		1860	
Noah H. Swayne, . . .	Ohio,	Jan. 24, 1862	
Samuel F. Miller, . . .	Iowa,	July 16, 1862	
David Davis, . . .	Ill.	Dec. 8, 1862	
Stephen J. Field, . . .	Cal.	Mar. 10, 1863	
Salmon P. Chase, C. J., . . .	Ohio,	Dec. 6, 1864	

UNITED STATES ATTORNEY GENERALS.

Names.	Residence.	Appointment.	Decease or resignation.
Edmund Randolph, . . .	Va.	Sept. 26, 1789	1813
William Bradford, . . .	Penn.	Jan. 27, 1794	1795
Charles Lee, . . .	Va.	Dec. 10, 1795	1815
Levi Lincoln, . . .	Mass.	March 5, 1801	April 14, 1820
Robert Smith, . . .	Ky.	Dec. 23, 1805	1806
John Breckenridge, . . .	Md.	1805	Nov. 26, 1842
Cæsar A. Rodney, . . .	Del.	Jan. 20, 1807	1824
William Pinckney, . . .	Md.	Dec. 11, 1811	Res. Jan. 9, 1814 died Feb. 25, 1822
Richard Rush, . . .	Penn.	Feb. 10, 1814	May 30, 1859
William Wirt, . . .	Va.	Dec. 16, 1817	Feb. 18, 1835
John McP. Berrien, . . .	Ga.	March 9, 1829	Jan. 1, 1850
Roger B. Taney, . . .	Md.	July 20, 1831	Oct. 12, 1864
Benjamin F. Butler, . . .	N. Y.	Nov. 15, 1833	Nov. 8, 1858
Felix Grundy, . . .	Tenn.	Sept. 1, 1838	Dec. 1840
Henry D. Gilpin, . . .	Penn.	Jan. 11, 1840	Jan. 29, 1860
John J. Crittenden, . . .	Ky.	March 5, 1841	July 26, 1863
Hugh S. Legaré, . . .	S. C.	Sept. 1841	June 20, 1843
John Nelson, . . .	Md.	July 1, 1843	1860
John Y. Mason, . . .	Va.	March 6, 1845	Oct. 3, 1859
Nathan Clifford, . . .	Me.	Oct. 17, 1846	
Isaac Toucey, . . .	Conn.	June 21, 1848	
Reverdy Johnson, . . .	Md.	March 8, 1849	
John J. Crittenden, . . .	Ky.	July 22, 1850	July 26, 1863
Caleb Cushing, . . .	Mass.	March 5, 1853	
Jeremiah S. Black, . . .	Penn.	1857	
Edwin M. Stanton, . . .	Penn.	1860	
Edward Bates, . . .	Mo.	1861	
James Speed, . . .	Ky.	1865	
Henry Stanberry, . . .	Ohio,	1866	
William M. Evarts, . . .	N. Y.	1868	
Ebenezer R. Hoar, . . .	Mass.	1869	

UNITED STATES SUPREME COURT REPORTS.

Dallas's Reports,	1790 to 1807,	4 vols.
Cranch's Reports,	1801 to 1815,	9 vols.
Wheaton's Reports,	1816 to 1827,	12 vols.
Peters's Reports,	1828 to 1842,	17 vols.
Howard's Reports,	1843 to 1860,	24 vols.
Black's Reports,	1861 to 1863,	2 vols.
Wallace's Reports,	1863 to 1868,	6 vols.

UNITED STATES CIRCUIT AND DISTRICT COURT REPORTS.

Washington,	1803 to 1827,	4 vols.
Baldwin,	1828 to 1833,	1 vol.
Gilpin,	1828 to 1835,	1 vol.
Crabbe,	1836 to 1846,	1 vol.
Wallace,	May and Oct. 1801	1 vol.
Wallace, Jr.,	1842 to 1853,	2 vols.
Paine,	1810 to 1826,	2 vols.
Brockenbrough,	1802 to 1833,	2 vols.
Cranch,	1801 to 1841,	6 vols.
McLean,	1829 to 1855,	6 vols.
Blatchford, C. C.,	1846 to 1857,	3 vols.
Peters' Admiralty,	1792 to 1807,	2 vols.
Peters' C. C.,	1803 to 1818,	1 vol.
Bee,	1792 to 1806,	1 vol.
Hopkinson,	1780 to 1806,	1 vol.
Newberry,	1843 to 1857,	1 vol.
Hempstead (Ark.),	1836 to 1849,	1 vol.
McAllister (Cal.),	1855 to 1859,	1 vol.
Olcott,	1843 to 1847,	1 vol.
Abbott,	1847 to 1850,	1 vol.
Blatchford's Admiralty,	1845 to 1861,	4 vols.
Blatchford and Howland,	1827 to 1837,	1 vol.
Blatchford's Prize Cases,	1861 to 1865,	1 vol.
Garrison,	1812 to 1815,	2 vols.
Mason,	1816 to 1830,	4 vols.
Ware,	1822 to 1839,	1 vol.
Ware, 2d edition,	1854 to 1859,	1 vol.
Daveis,	1839 to 1849,	1 vol.
Sumner,	1829 to 1839,	3 vols.
Story,	1839 to 1843,	3 vols.
Woodbury and Minot,	1845 to 1851,	2 vols.
Curtis,	1851 to 1856,	2 vols.
Sprague's Decisions,	1841 to 1865,	2 vols.
Benedict, in parts	1865 to 1867,	4 numbers.

ENGLISH ADMIRALTY REPORTS.

Hay and Marriott,	1776 to 1779,	1 vol.
Christopher Robinson,	1798 to 1808,	6 vols.
Edwards,	1808 to 1812,	1 vol.
Acton, Prize Cases,	1809 to 1810,	2 vols.
Dodson,	1811 to 1822,	2 vols.
Haggard,	1822 to 1838,	3 vols.
William Robinson,	1838 to 1850,	3 vols.
English Law and Equity,	1850 to 1857,	
Spinks,	1853 to 1855,	2 vols.
Spinks' Prize Cases,	1854 to 1855,	1 vol.
Jurist,	1837 to 1854,	18 vols.
Knapp's P. C.	1829 to 1836,	3 vols.
Moore's P. C.	1836 to 186—, 14 vols., 1st series, 5 N. S.	
Notes of Cases,	1841 to 1850,	7 vols.
Swabey,	1855 to 1859,	1 vol.
Law Times, (N. S.)	1859 to 1863,	
Lushington,	1859 to 1862,	1 vol.
Browning and Lushington,	1862 to 1865,	1 vol.
1 Adm. and Eccl. Report,	1865 to 1867,	1 vol.
Stewart, (N. S.)	1803 to 1813,	1 vol.
Stuart, (L. C.)	1810 to 1835,	1 vol.

OF ENGLISH ADMIRALTY JUDGES, PRIOR TO 1776, A FEW ONLY
ARE KNOWN.

Sir Julius Cæsar, in the time of Queen Elizabeth.
 Sir Henry Vane, in the time of Charles I.
 Dr. Dunn.
 Sir Leoline Jenkins, in the time of Charles II.
 Sir Thomas (Dr.) Exton, in the time of Charles II.
 Sir Charles Hedges, in the time of William and Anne.
 Sir Henry Martin.
 Sir George Lee.

ENGLISH ADMIRALTY JUDGES SINCE 1776.

Dr. George Hay, 1776.
 Sir James Marriott, 1779.
 Sir William Scott (Lord Stowell), 1798 to 1827.
 Sir Christopher Robinson, appointed 1828, died 1833.
 Sir John Nicholl, appointed May 31, 1833, died August 26, 1838.
 Sir Stephen Lushington, appointed October 17, 1838, resigned 1867.
 Sir Robert Phillimore, 1867.

APPENDIX B, page 22.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA, ETC.

PRELIMINARY.

Art. 1. In the following rules every steamship which is under sail and not under steam is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

RULES CONCERNING LIGHTS.

Art. 2. The lights mentioned in the following articles, numbered 3, 4, 5, 6, 7, 8, and 9, and no others, shall be carried in all weathers, from sunset to sunrise.

Art. 3. Sea-going steamships when under way shall carry —

(a.) *At the foremast head*, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass; so fixed as to throw the light ten points on each side of the ship, namely: from right ahead to two points abaft the beam on either side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles;

(b.) *On the starboard side*, a green light, so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side; and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles;

(c.) *On the port side*, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the port side; and of such a character, as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles;

(d.) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the borders.

Art. 4. Steamships, when towing other ships, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as

to distinguish them from other ships. Each of these mast-head lights shall be of the same construction and character as the mast-head lights which other steamships are required to carry.

Art. 5. Sailing ships under way, or being towed, shall carry the same lights as steamships under way, with the exception of the white mast-head lights, which they shall never carry.

Art. 6. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the *green* light shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

Art. 7. Ships, whether steamships or sailing ships, when at anchor in roadsteads or fairways, shall exhibit, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light, in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light visible all around the horizon, and at a distance of at least one mile.

Art. 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.

Art. 9. Open fishing-boats and other open boats shall not be required to carry the side lights required for other vessels; but shall, if they do not carry lights, carry a lantern having a green slide on the one side, and a red slide on the other side; and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

Fishing vessels and open boats when at anchor, or attached to their nets and stationary, shall exhibit a bright white light.

Fishing vessels and open boats shall, however, not be prevented from using in addition a flare-up, if considered expedient.

RULES CONCERNING FOG-SIGNALS.

Art. 10. Whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded, at least every five minutes, namely : —

(a.) Steamships under way shall use a steam-whistle placed before the funnel, not less than eight feet from the deck.

(b.) Sailing ships under way shall use a fog horn ;

(c.) Steamships and sailing ships, when not under way, shall use a bell.

STEERING AND SAILING RULES.

Art. 11. If two sailing ships are meeting end on, or nearly end on so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Art. 12. When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side ; except in the case in which the ship with the wind on the port side is close-hauled, and the other ship free, in which case, the latter ship shall keep out of the way ; but if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

Art. 13. If two ships under steam are meeting end on, or nearly end on so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Art. 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 15. If two ships, one of which is a sailing ship, and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

Art. 16. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse ; and every steamship shall, when in a fog, go at a moderate speed.

Art. 17. Every vessel overtaking any other vessel shall keep out of the way of the said last-mentioned vessel.

Art. 18. Where, by the above rules, one of the ships is to keep

out of the way, the other shall keep her course, subject to the qualifications contained in the following article:—

Art. 19. In obeying and construing these rules, due regard must be had to all dangers of navigation; and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.

Art. 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

DIAGRAMS.

To illustrate the use of lights carried by vessels at sea, and the manner in which they indicate to a vessel which sees them, the position and description of the vessel that carries them:—

When both red and green lights are seen:

A sees a red and green light ahead; A knows that a vessel is approaching her on a course directly opposite to her own, as B:



If A sees a white mast-head light above the other two, she knows that B is a steam-vessel.

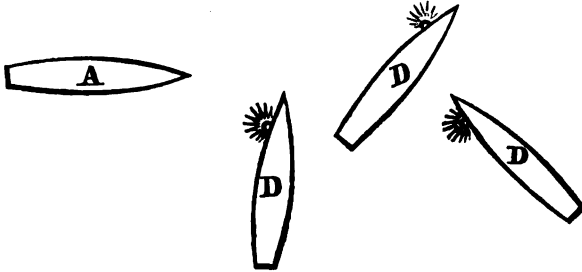
When the red and not the green light is seen:

A sees a red light ahead or on the bow; A knows that either—
1st, a vessel is approaching her on her port-bow, as B:



[N. B. — If A continue her present course, without change, collision with B is inevitable: therefore A must wear a little, and each will pass the other safely.]

Or, 2d, a vessel is crossing in some direction to port, as D, D, D.



If A sees a white mast-head light above the red light, A knows that the vessel is a steam vessel, and is either approaching her in the same direction as B, or is crossing to port, in some direction, as D, D, D.

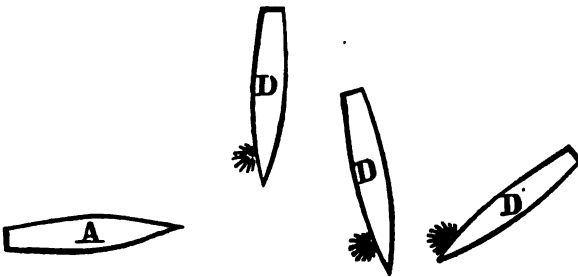
When the green and not the red light is seen :

A sees a green light ahead, or on the bow ; A knows that either

1st, a vessel is approaching her on her starboard bow, as B :



Or, 2d, a vessel is crossing in some direction to starboard, as D, D, D.



If A sees a white mast-head light above the green light, A knows that the vessel is a steam vessel, and is either approaching her in the same direction as B, or is crossing to starboard in some direction, as D, D, D.

APPENDIX C, page 24.

The whole commission is recited in Duponceau on Jurisdiction, 158; but the more material part only is given here:

" COMMISSION OF VICE-ADMIRAL.

" *George the Third, &c., Greeting* :—

" We, confiding very much in your fidelity, care, and circumspection in this behalf, do, by these presents, which are to continue during our pleasure only, constitute and depute you, the said A. B., Esq., our Captain-General and Governor-in-Chief aforesaid, our Vice-Admiral, Commissary and Deputy in the office of Vice-Admiralty in our Province of — aforesaid, and the territories depending thereon in America, and in the maritime parts of the same and thereto adjoining whatsoever; with power and authority in —, &c., and also throughout all and every the sea-shores, public streams, ports, fresh water rivers, creeks, and arms, as well of the sea as of the rivers and coasts whatsoever of our said Province of —, &c.; to take cognizance of, and proceed in, all civil and maritime causes, and in complaints, contracts, offenses, or suspected offenses, crimes, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses, injuries, extortions, and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and all other vessels whatsoever, employed or used within the maritime jurisdiction of our Vice-Admiralty of our said Province of — and the territories depending thereon, or between any other persons whomsoever, had, made, begun or contracted for any matter, thing, cause, or business whatsoever, done or to be done, within our maritime jurisdiction aforesaid, together with all and singular their incidents, emergencies, dependencies, annexed or connexed causes, whatsoever or howsoever, and such causes, complaints, contracts, and other the premises above said or any of them, which may happen to arise, be contracted, had or done, to hear and determine according to the rights, statutes, laws, ordinances, and customs *anciently observed,*" &c., &c.

APPENDIX D, page 34.

"Att y^e second Sessions of the Generall Court, held at Boston, 14th of October, 1668.

"The Court mett at y^e time, & were present, — Richard Bellingham, Esq., Gov^r, Francis Willoughby, Esq., Dep^t Gov^r, Symon Bradstreet, Samuel Symonds, Daniel Gookin, Daniel Dennison, Symon Willard, Richard Russell, Thomas Danforth, William Hathorn, Eliazur Lusher, John Leueret, John Pinchon, Edward Tyng, Esq's.

"Whereas, through the blessing of God vpon this jurisdiction, the navigation & maritime affaires thereof is growne to be a considerable interest, the well management whereof is of great concernment to the publick weale, for the better ordering the same for the future, & that there may be knowne lawes & rules for all sorts of persons imployed therein, according to their seuerall stations and capacities, & that there may be one rule for the guidance of all Courts in their proceedings in distribution of justice, this Court doeth order, & be it ordered by the authority thereof, —

"Sect. 1. That whereas there is many times differences betweene ounors of shippes, ketches, barques, & other vessells in setting forth their seuerall parts, whereby damage doth accrew to the particular concernment of ounors, & if not prevented may be a great obstruction of trade. Where there are seuerall ounors concerned, as ounors in ships, ketch^s, barques, or other vessells whatsoever, vsed for trafficque, commerce, fishing, logs, board, timber, wood, or stone carriage vpon salt or fresh waters, all such ounors of lesser part shall be concluded for the setting forth of his part by y^e majo^r part of the whole concerned; such ounors so concluded hauing notice given them of the meeting for such conclusion. If they be nigh hand, & in case of any ouner refusing, or by reason of neglect or absence, or not able to provide for the setting forth his part, the master of such ship or vessel may take vp vpon the bottom for the setting forth of the said part, the wth being defrayed, the remajnder of the income of such part to be paid by the master to y^e said ouner.

"Sect. 2. And in case of freightment, where any ouner shall refuse to assent to the letting out of ship or vessell where he is interested, such dissenter shall manifest it by some publik act of protest, before the signing of charter party, except the master or the rest of the

owners, or both, conceale from him or them their actings, then his or their protest, after charter party signed by themselves or agents, shall be taken for legall dissent, yet not to hinder the proceed of the ship or vessell; but that those so sending hir forth shall be lable to respond his part vpon ensurance, according to y^e custome of merchants, w^{ch} ensurance is to be defalked out of that part of hire due for such owners w^{ch} dissented.

"Sect. 3. Whereas masters of ships or other vessells haue their owners liue parte in one country & part in another, whereby they haue in themselves not only oportunity, & some haue made vse thereof, in their oune persons, to represent the majo^r part of the owners in the place where he comes, it is therefore ordered, that such master shall not be taken to haue vote in the ordering of such vessell further then his oune interest, except he make it appeare to the rest of the owners where he is, that he is authorized vnder the hands of such owners absent, & then he is to haue votes according to the proportion of parts he stands for, & the majority of parts are to carry it as before; nevertheless, it is to be vnderstood, that any owner hath power to make sale of his part, either to the rest of the owners or others, as may be most to his oune advantage; and if any master shall presume to act contrary herevnto, what damage shall be sustejned by the rest of the owners, the master shall be lable to make good, it being duely proued against him.

"Sect. 4. All masters taking chardge as masters of ship or other vessell, & not being sufficient to discharge his place, or that through negligence or otheruise shall imbezel the owners or imployers stockes or time, or that shall suffer his men to neglect their due attendance on board, both by day & night, especially when or whilst merchants goods are on board, & that himself or mate be not on board euery night, to see good orders kept, vpon defect therein, such master shall be lable to pay the damage that shall acrew by such neglect, it being duely proved against him.

"Sect. 5. For the masters better securing their men to them, & to prevent all coven, they shall make cleere agreem^{ts} wth their mariners & officers for their wages, & those agreements enter into a booke, & take the seuerall mens hands thereto, a copy whereof the master, as a portlige bill, shall leaue wth their owners, if required of them, before their setting saile vpon the voyage; & all such agreements the master shall make good to the seamen, & such ship or vessell as they saile in shall be liable to make good the same.

" Sect. 6. All masters of greater or lesser vessells shall make due & meete provisions of victualls & drincke for their seamen or passengers, according to the laudable custome of our English nation, as the custome & capacity of the places they saile from will admitt, vpon pœnalty of paying damages susteyned for neglect thereof.

" Sect. 7. That no master shall ship any seaman or marriner that is ship^t before by another master, or imployer, vpon a voyage; nor shall any seaman ship himselfe to any other man vntill he be discharged from him that ship^t him, vpon the pœnalty of him that entertheyns him, to pay one months pay, that such seaman agrees for; as also, of such seaman shipping himself, to pay one months pay that he agrees for, the halfe thereof to be paid to the vse of the poore of the toun or place where such offence is committed, the other halfe to the complainer or informer.

" Sect. 8. No master of ship or vessell shall saile into any hauen or port, except necessitated therevnto by wind or weather, or for want of provision, or for security from pyrates, but such port as by charter party or his bill of lading he is bound vnto, vntill he hath deliuered his goods according to his engagement; & in case any master shall take in goods for more posts & places then one, he shall declare himselfe so to doe to those that freight vpon him; & in case he shall voluntarily goe to any other port or harbor, then he is obliged to as aboue, if damage to the merchants happen thereby, such master shall make good the same, it being duely proved ag^t him.

" Sect. 9. Any master hired out or imployed by his owners vpon any voyage, receiving aduice from his imployers that the alteration of the voyage, when they are abroad, may be much for their security & advantage, by going to some other port, the master seeing meet to close wth that aduice, the marriners shall not hinder his proceed, vnlesse where any of the seamen shall haue made a particular contract wth the master to the contrary, provided that they be not caried to stay out aboue one yeare, nor be carried to any place where they may be liable to be pressed into a *a* service they are not willing vnto.

" Sect. 10. Masters shall see that their officers & marriners be duely paid their wages according to agreement made wth them, vpon the finishing of their voyage, wthout delay or trouble, vpon pœnalty of paying damages for neglect, & all costs that the seamen shall be at for recouering the same.

" Sect. 11. Whereas many times masters take in merchants goods

on board their ships or vessels vpon freight, when yet they are not meetly fitted wth suitable tackling & seamen for the security of such ships or vessells & goods, —

“ It is ordered, that in case any master of ship or vessell, after he hath laden vpon his ship or vessell any merchants goods to be transported, shall, for want of sufficient ground tackle, (if to be had,) or because of want of sufficient men being on board, come ashore to the damage of such merchants or freighters in their goods, the ship shall be liable to make good such damages; & in case the defect appeare to be in the master & men, both or either the owners shall recouer such damage from them.

“ Sect. 12. Where any ship master hath moored his ship or vessel, none other shall come so near to him first moored as to doe him damage, or receive damage by him, vpon the pœnalty of him so coming to make good all the damage, & to be further punished, if wilfulness or perversnes in the action be proved against him.

“ Sect. 13. In case any master of ship or vessell vnder saile shall run on or board any other ship or vessell at an anchor, & damnify him, the party offending shall pay the damage; and such ship or vessell as he sailes in shall be liable to arrest for the making good the damage, to be judged by indifferent men appointed by the judges thereof, vnless the parties agree among themselues.

“ Sect. 14. In case of losse of goods, by reason of throwing some ouerboard to ease y^e vessell to saue the rest, the goods throune ouerboard shall not be donne wthout the master or majo^r parte of the companjes consent, or at least wth the officers, wth the master, w^{ch} goods shall be brought into an auerage, & the whole losse to be borne by ship & goods, & wages, in proportion, that are saued. The like course shall be for cutting of masts & loss thereofe, or boates, cables, or anchors, as also of rigging & sailes for the safety of the whole. The merchants goods are to beare a part of the losse.

“ Sect. 15. In case a ship or vessell, at setting forth prooues deficient, & gives over the voyage, the charges the merchant hath susteyned in shiping & landing his goods shall be borne by the master & owners of such vessell that presumes to take goods into an insufficient bottom.

“ Sect. 16. Any ship or vessell at sea receiving damage by the masters or marriners negligence, yet bringeth the merchants goods home, & deliuereth them according to bills of lading, he shall receive

his freight; but if the goods be damnified, the master or marriners shall make good the damage.

“Sect. 17. If any ship or vessell in storme shall breake loose & fall vpon another, & doe her damage for want of ground tackle, the ship breaking loose shall make good the damage; but if it appeare the master or marriners, or both, are negligent of freshing their hoase, or clearing their cables, they shall pay the damage for such neglect.

“Sect. 18. All marriners being ship^d vpon a voyage, & in pay, they shall duely attend the service of the master, ship, or vessell, for the voyage, & not absent themselues day or night wthout leaue from the master, vpon forfeite for euery offence fīue shillings.

“Sect. 19. No officers or marriners shall be disorderly or vnruely, to occasion disturbance in the ship or other vessell he is shipped vpon, to hinder or damnify the voyage, to be prooued by the master or other marriners, or both, vpon pœnalty of paying the damage, if able; & in case of inabilitje to pay, or suffer corporall punishment, as the nature of the offence may appeare to the judges; & in case master or marriners shall conceale the offences of such, & refuse to give in euidences therein, they shall be annexed or imprisoned, as the judges shall see meete.

“Sect. 20. If any shall vndertake the charge of pylot, boatswajne, gunner, or any other office in ship or other vessell, & not be able to discharge the duty of the place, such shall loose their wages in part or in whole, & be further punished for their presumption, as the judges shall see meete.

“Sect. 21. All marriners shall keepe true watch at sea or in harbor, as the master shall appoint, vpon pajne of forfeite of twelue penc for euery default, to be defaulted out of their wages.

“Sect. 22. Any marriner that hath entered vpon a voyage, & shall depart & leaue the voyage, shall forfeit all his wages, one halfe to the poore, the other halfe to the master and ouners, & be further punished by imprisonment or otherwise, as the case may be circumstanced, to be judged by the magistrate or magistrates they are complained to, except such seaman shall shew just cause for his so leaving the voyage, & shall procure an order therefore from authority.

“Sect. 23. If any marriner shall haue received any considerable part of his wages, & shall runn away from the ship or vessell he belongs to, & decljne the service of the master in the prosecution of

the voyage, he shall be pursued as a disobedient runaway servant, & proceeded wth as such a one.

"Sect. 24. If any marriner shall enterteyne any person or persons on board the ship or vessell he sajles in, wthout the masters leaue, or masters or marriners shall doe it at vnseasonable times, he or they shall forfeite twenty shillings, one halfe to the poore, the other halfe to the ouners.

"Sect. 25. No seaman or seamen, or officer, shall committ any outrage vpon the master of any ship or vessell ; but those so offending shall be severely punished by fine or other corporall punishment, as the fact shall appeare to be circumstanced to the judges that shall heare it, and as they shall judge meete. If any officers or marriners shall combine against the master, whereby the voyage shall be diverted or hindered, or that damage thereby shall accrue to the ship & goods, they shall be punished wth losse of wages, or otherwise as mutineers, as the case may require.

"Sect. 26. In case any ship or vessell be in distress at sea by tempest or other accident, the marriners shall doe their vtmost endeavour to asist the master in saving ship & goods, and not desert him wthout apparent hazard appeare that by their staying they may loose their liues.

"Sect. 27. And in case of suffering shipwracke, the marriners, wthout dispute, vpon their getting on shoare, to doe their vtmost endeavours to saue the ship or vessell, tackle, & apparrell, as also the merchants goods, as much as may, out of which they shall haue a meete compensation for their hazard & pajnes, & any vpon conviction of negligence herein shall be punished." — *Mass. Col. Rec.*

APPENDIX E, page 36.

"III. The court of *policies of assurance*, when subsisting, is erected in pursuance of the statute 43 Eliz. c. 12, which recites the immemorial usage of policies of assurance, "by means whereof it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavy upon few, and rather upon them that adventure not, than upon those that do adventure: whereby all merchants, especially those of the younger sort, are allured to venture more willingly

and more freely ; and that heretofore such assurers had used to stand so justly and precisely upon their credits, as few or no controversies had arisen thereupon ; and if any had grown, the same had from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London ; as men by reason of their experience fittest to understand and speedily decide those causes ;" but that of late years divers persons had withdrawn themselves from that course of arbitration, and had driven the assured to bring separate actions at law against each assurer ; it therefore enables the lord chancellor yearly to grant a standing commission to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants ; any three of which, one being a civilian or a barrister, are thereby and by the statute 13 and 14 Car. II. c. 23, empowered to determine in a summary way all causes concerning policies of assurance in London, with an appeal (by way of bill) to the court of chancery. But the jurisdiction being somewhat defective, as extending only to London, and to no other assurances but those on merchandise,¹ and to suits brought by the assured only, and not by the insurers,² no such commission has of late years issued ; but insurance causes are now usually determined by the verdict of a jury of merchants, and the opinion of the judges in a case of any legal doubts ; whereby the decision is more speedy, satisfactory, and final ; though it is to be wished, that some of the parliamentary powers invested in these commissioners, especially for the examination of witnesses, either beyond the seas or speedily going out of the kingdom,³ could at present be adopted by the courts of Westminster-hall, without requiring the consent of parties." — 3 *Blackstone's Commentaries*, pp. 74, 75.

APPENDIX F, page 77.

RULES FOR PILOTS, revised October 17, 1857, to take effect January 1, 1858, adopted by Supervising Inspectors, under 29th § of the Act August 30, 1852.

"§ 29. It shall be the duty of the supervising inspectors to establish such rules and regulations to be observed by all such vessels on passing each other, as they shall from time to time deem necessary for safety ; two printed copies whereof, signed by said inspectors, to

¹ Styl. 166.

² 1 Show. 396.

³ Stat. 13 & 14 Car. II. c. 22.

be furnished such vessels, and kept up in conspicuous places, which shall be observed both night and day."

For non-observance of same, master, etc., liable to \$30 penalty, and *all* damage, and the vessel, in case of collision, not to be justified.

RULES. Preamble.— All pilots of steamers navigating seas, gulfs, lakes, bays, or rivers (except those emptying into the Gulf of Mexico and their tributaries), when meeting or approaching each other, by day or night, and as soon as within sight, and fully within sound of the steam whistle, shall observe and comply with the following regulations:—

RULE 1. When steamers meet "head and head," it shall be the duty of each to pass to the right or on the larboard side of the other; and either pilot, upon determining to pursue this course, shall give as a signal of his intention *one* short and distinct blast of his steam whistle, which the other shall answer promptly by a similar blast of the whistle. But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting "head and head," or if the vessels are approaching in such a manner, that passing to the right (as above directed), is deemed unsafe or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give *two* short and distinct blasts of his steam whistle, which the other pilot shall answer promptly by two similar blasts of his whistle, and they shall pass to the left or on the starboard side of each other.

Note.— *In the night*, steamers will be considered meeting "head and head," so long as both the colored lights of each are in view of the other. *In the day*, a similar position will also be considered "head and head."

RULE 2. When steamers are approaching each other in an oblique direction (as shown in diagram of 5th situation), they will pass to the right, as if meeting "head and head," and the signal by whistle shall be given, and answered promptly as in that case specified.

RULE 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given or answered erroneously, or from other cause, the pilot so in doubt, shall immediately signify the same by giving several short and rapid blasts of the steam whistle, and if the vessels shall have approached within half a mile of each other, both shall be immediately *slowed* to a speed barely sufficient

for steerage way, until the proper signals are given, answered, and understood, or until the vessels shall have passed each other.

RULE 4. When steamers are running in a fog, or thick weather, it shall be the duty of the pilot to cause a *long* blast of the steam whistle to be sounded at intervals not exceeding two minutes; and no steamer shall, in any case, be justified in coming into collision with another vessel if it be possible to avoid it.

RULE 5. Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal, *one* long blast of the steam whistle, which signal shall be answered by a similar blast given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered. But if the *first* alarm signal of such pilot be not answered, he is to consider the channel clear, and govern himself accordingly.

RULE 6. The signals by blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting "head and head," or nearly so, but at all times, when passing or meeting, at a distance within half a mile of each other and whether passing to the starboard or larboard.

N. B. — The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel, or in the vicinity of wharves. Under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.

RULE 7. *Steamers' lights to prevent collision at night.*

When under way. — All steamers rigged for carrying sail must carry a bright white light at the foremast head, and all other steamers must carry a bright white light on the *stem* or near the bow, and another on a mast near the stern, or on the flagstaff at the *stern*, the last named being at an elevation of at least *twenty feet* above all other lights upon the steamer. All steamers must carry a green light upon the starboard side, and a red light on the port side.

Note. — Steamers, although rigged for carrying sail, instead of the foremast head light, may adopt the forward and stern lights, provided for steamers *not* rigged for carrying sail; provided said lights are so

arranged and placed on the vessel as to secure the contemplated objects.

When at anchor. — A bright white light at least twenty feet above the surface of the water; the lantern so constructed and placed as to show a good light all around the horizon.

FIRST. The mast-head light of steamers rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the lantern to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely: from right ahead to *two* points abaft the beam on either side of the ship.

SECOND. The stem and stern lights of steamers not rigged for carrying sail, to be visible at a distance of at least five miles in a clear dark night, and the respective lanterns to be so constructed that the stem light shall show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely: from right ahead to *two* points abaft the beam on either side of the ship, and that the *stern* light shall show a uniform light all around the horizon.

THIRD. The colored side lights to be visible at a distance of at least *two* miles in a clear dark night, and the lanterns to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely: from right ahead to *two* points abaft the beam on their respective sides.

FOURTH. The side lights are to be fitted with inboard screens of at least six feet in length (clear of the lantern), to prevent them from being seen across the bow. The screens to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith.

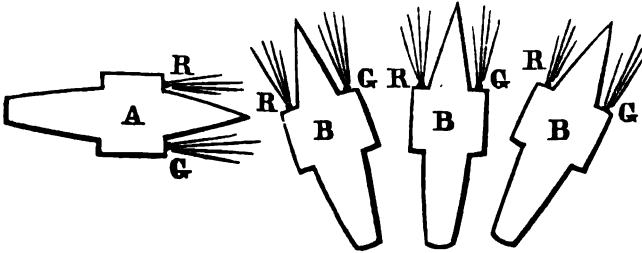
Note first. — The object of carrying the bright white light at the foremast head of steamers rigged or carrying sail, is merely to intimate to other vessels the approach or presence of such steamer.

Note second. — The object of the colored lights required to be carried on *all* steamers is to indicate to other vessels the course or direction such steamers may be steering.

Note third. — The object of requiring steamers not rigged for carrying sail to carry a white stern light in connection with a white light on the stem or near the bow, is to provide (when the vessel's rig will admit of it) a method of determining, by a central range of lights, more correctly the course that such vessel is running.

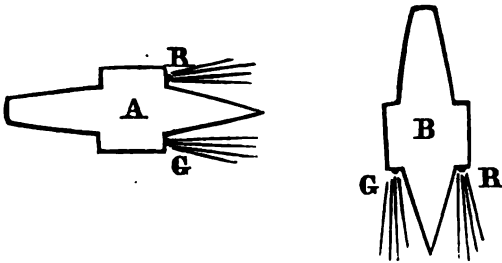
DIAGRAMS.

FIRST SITUATION.



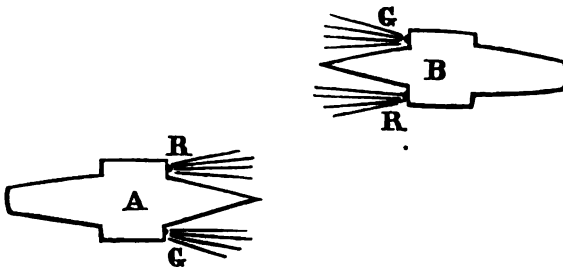
A ports his helm, B keeps away if, etc.

SECOND SITUATION.



Here A will starboard his helm, and if he fear collision, will *slow* or *stop* his boat.

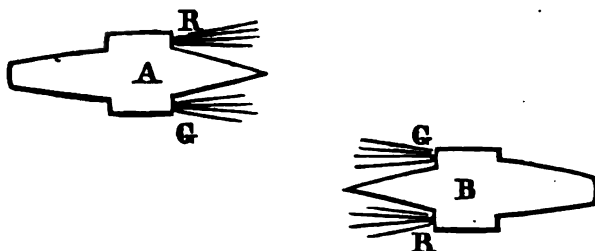
THIRD SITUATION.



Both reds visible; and green screened.

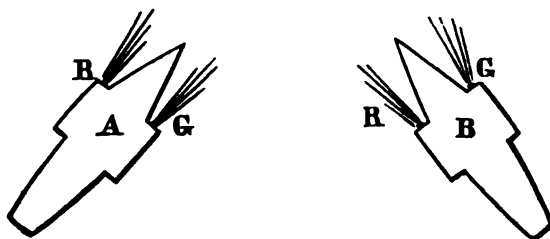
Steamers passing to *port*, give *one* blast of steam whistle, and pursue each his course.

FOURTH SITUATION.



Greens visible; reds screened — both passing to starboard — two blasts, and proceed.

FIFTH SITUATION.



Requires caution, red of B, and green of A visible, indicates an approaching in oblique direction.

Here A *ports*, and passes astern of B, while B *continues* on, or keeps away, if necessary to avoid collision.

SIXTH SITUATION.



Red and green both visible. Steamers are approaching "head and head."

Here both give *one* blast of whistle, port the helm, and pass to the right, unless for good reasons pilot deviates from standing rules. Then he must give early notice by two blasts, and pass to the *left*.

Colored lights to be fitted with wood or canvass screens, inboard close to the light — so both can only be seen *right ahead*. Observation of this indicates relative course.

Sailing vessels ought to be supplied with red and green lights; and at anchor, all should exhibit *bright white lights*, twenty feet at least, above the surface of the water.

§ 29. Delinquent pilots, etc., \$30 penalty, and liable for all damages; § 9, cl. 9, and license to be revoked.

APPENDIX G, page 78.

AN ACT FIXING CERTAIN RULES AND REGULATIONS FOR PREVENTING COLLISIONS ON THE WATER.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after September one, eighteen hundred and sixty-four, the following rules and regulations for preventing collisions on the water be adopted in the navy and the mercantile marine of the United States: *Provided*, That the exhibition of any light on board of a vessel-of-war of the United States may be suspended whenever, in the opinion of the Secretary of the Navy, the commander-in-chief of a squadron, or the commander of a vessel acting singly, the special character of the service may require it.

CONTENTS.

Article 1. Preliminary.

RULES CONCERNING LIGHTS.

2. Lights to be carried as follows : —
3. Lights for steamships.
4. Lights for steam-tugs.
5. Lights for sailing ships.
6. Exceptional lights for small sailing vessels.
7. Lights for ships at anchor.
8. Lights for pilot vessels.
9. Lights for fishing vessels and boats.

RULES CONCERNING FOG SIGNALS.

10. Fog signals.

STEERING AND SAILING RULES.

11. Two sailing ships meeting.
12. Two sailing ships crossing.
13. Two ships under steam meeting.
14. Two ships under steam crossing.
15. Sailing ship and ship under steam.
16. Ships under steam to *shacken* [slacken] speed.
17. Vessels overtaking other vessels.
18. Construction of articles 12, 14, 15, and 17.
19. Proviso to save special cases.
20. No ship under any circumstances to neglect proper precautions.

PRELIMINARY.

Article 1. In the following rules every steamship which is under sail, and not under steam, is to be considered a sailing ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

RULES CONCERNING LIGHTS.

LIGHTS.

Article 2. The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

LIGHTS FOR STEAMSHIPS.

Article 3. All steam vessels when under way shall carry —

(a) At the foremast head, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, namely: from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(b) On the starboard side, a green light, so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(c) On the port side, a red light, so constructed as to show an uniform unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(d) The said green and red side lights shall be fitted with inboard screens, projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow.

LIGHTS FOR STEAM TUGS.

Article 4. Steamships, when towing other ships, shall carry two bright white mast-head lights vertically, in addition to their side lights, so as to distinguish them from other steamships. Each of these mast-head lights shall be of the same construction and character as the mast-head lights which other steamships are required to carry.

LIGHTS FOR SAILING SHIPS.

Article 5. Sailing ships under way or being towed shall carry the same lights as steamships under way, with the exception of the white mast-head lights, which they shall never carry.

EXCEPTIONAL LIGHTS FOR SMALL SAILING VESSELS.

Article 6. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green lights shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

LIGHTS FOR SHIPS AT ANCHOR.

Article 7. Ships, whether steamships or sailing ships, when at anchor in roadsteads or fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all around the horizon, and at a distance of at least one mile.

LIGHTS FOR PILOT VESSELS.

Article 8. Sailing pilot vessels shall not carry the lights required for other sailing vessels, but shall carry a white light at the mast-head, visible all round the horizon, and shall also exhibit a flare-up light every fifteen minutes.

LIGHTS FOR FISHING VESSELS AND BOATS.

Article 9. Open fishing boats and other open boats shall not be required to carry side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on the one side and a red slide on the other side, and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing vessels and open boats when at anchor, or attached to their nets and stationary, shall exhibit a bright white light. Fishing vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.

RULES GOVERNING FOG-SIGNALS.

FOG-SIGNALS.

Article 10. Whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every five minutes, namely:

- (a) Steamships under way shall use a steam-whistle placed before the funnel, not less than eight feet from the deck.
- (b) Sailing ships under way shall use a fog-horn.
- (c) Steamships and sailing ships when not under way shall use a bell.

STEERING AND SAILING RULES.

TWO SAILING SHIPS MEETING.

Article 11. If two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

TWO SAILING SHIPS CROSSING.

Article 12. When two sailing ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close-hauled, and the other ship

free, in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.

TWO SHIPS UNDER STEAM MEETING.

Article 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

TWO SHIPS UNDER STEAM CROSSING.

Article 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

SAILING SHIP AND SHIP UNDER STEAM.

Article 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

SHIPS UNDER STEAM TO SLACKEN SPEED.

Article 16. Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed.

VESSELS OVERTAKING OTHER VESSELS.

Article 17. Every vessel overtaking any other vessel shall keep out of the way of said last mentioned vessel.

CONSTRUCTION OF ARTICLES 12, 14, 15, AND 17.

Article 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article:

PROVISO TO SAVE SPECIAL CASES.

Article 19. In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.

NO SHIP UNDER ANY CIRCUMSTANCES TO NEGLECT PROPER PRECAUTIONS.

Article 29. Nothing in these rules shall exonerate any ship, or the owner or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Approved, April 29, 1864.

APPENDIX H, pages 180 and 529.

2 Spinks' Reported Cases.

Page 1. The *Primus*, prize, owners, costs. The *Johann Christoph*, colorable transfer to master. The *Ocean Bride*, a fictitious transfer.

Page 23. In the *Catalina*, a Dutch and Spanish vessel came into collision; the Spanish crew boarded the other vessel, and behaved with great violence. The court thought the Dutch vessel to blame for the collision and pronounced for the Spaniard; but gave no costs, on account of the subsequent misconduct of the Spanish crew.

Page 27. The *Clyde*, another case of collision.

Page 30. The *Graaff Arthur Bernstorff*. The court has no power, at the suit of a British part owner of a foreign vessel, to arrest her until bail is given for her safe return to her own port abroad.

Page 31. The *Elise Wilhelmine*, a vessel unjustifiably seized, was ordered to be restored with costs and damages from the date of the seizure to the date of the offer of restitution; no claim was made to the cargo till some time after the seizure, the claimant thereto having mistaken his course of proceeding.

Held, that the owners of the cargo being British merchants, and therefore presumed to know the proper course, were only entitled to costs and damages from the date of their claim to the date of the offer of restitution.

Page 70. The *Silver Bullion*. The bark *S. R. P.*, having on board a large quantity of silver bullion, was stranded during a violent storm, on the rocks of Tynemouth, and was in a position of consider-

able peril, both to herself and her crew. Lieutenant Miller of the coast guard service, and three of his crew, proceeded to the spot, with Manby's apparatus, by means of which the crew and cargo were saved. They were assisted by a mariner named Armstrong, who boarded the bark in the cradle during the storm, and accelerated the landing of the crew and cargo.

An ignorant salvor, receiving a sum utterly inadequate to the services performed, and signing a *receipt in full* of all demands, is entitled to relief in a court of Admiralty, and is not barred of his suit for fair and proper remuneration of such services.

In an action for salvage, Lord Stowell gave a larger sum than the amount in which the cause was instituted and directed a fresh action to be instituted. Pritch. Dig. vol. 2, p. 1081 and 6.

Page 75. The Sylph. Two steamers came into collision in Half-way Reach in the Thames. Both to blame; one for not being on the side of the river directed by the statute, notwithstanding there was a usage for vessels to follow the course she took.

Page 87. The Ernest Merck, question of sale of enemy ship.

Page 93. The Atlantic, claim withdrawn, ship condemned and claimant in costs.

Page 93. The Johannes Christoph. Court is in habit of giving to foreign seamen the benefit of their own laws. Importation of foreign laws is not, however, a matter of course. The court should not adopt it, if the effect would be to work injustice on others. The proceeds of a foreign ship being insufficient to pay the preferable claims, monition to bring in freight to answer master's wages refused.

Page 101. The Soglasie, fraudulent transfer.

Page 107. The Swanland. Two steamers came into collision in the Humber; the court charged, that the S. improperly starboarded. S. replied that J.'s lights were not those required by the statute, and misled him to believe that J.'s vessel was at anchor, and that therefore he was right in starboarding his helm.

Held, both to blame, J. for not having his lights burning brightly, the deficiency in the lamps, however, not causing the collision; S. for starboarding. Damages divided.

Page 113. The Franciska, }
Page 159. The Steen Bille, } noticed sufficiently in text.

Page 161. The Union, visit to blockaded port not innocent, without special ignorance, for inquiry even.

Page 165. The Jeanne Marie, purchased before the war, owners

ignorant of blockade before sailing. Ship condemned and cargo restored.

Page 169. The Nornen, cargo bought in blockaded port, by a supercargo sent there by the owners, condemned.

Page 170. The Ostsee, under Mecklenburg colors, took in cargo of wheat at Cronstadt, May, 1854, and sailed for Elsinore for orders. Captured twenty-four hours out by H. M. S. Alban for breach of blockade and sent to England for adjudication.

In Admiralty, ship restored but prayer for costs and damages rejected.

On appeal to Privy Council, T. P. Leigh, for Judicial Committee, confirmed restitution but reversed decree as to costs and damages; allowing both.

Page 189. The Lanarkshire, suit for seamen's wages in England and *in rem* — another in Canada *in personam* — owners pleaded *lis pendens* in Canada. Adjudged to be good bar, as owners were ultimately liable in both suits.

Page 211. The Temiscouata. Plaintiff took bail for £250. The damages alone amounted to *less*; but *with* costs to *more* than that sum. Defendant tendered £250; but court adjudged him liable for the remainder of the sum necessary to cover plaintiff's costs, as he had unnecessarily compelled plaintiff to proceed by the more expensive mode of plea and proof, instead of by act or petition.

Page 212. The Ionian Ships. Trade of Ionian ships with Russia not illegal, as the inhabitants of the Ionian Islands were neither English, allies, nor enemies of Russia.

Page 228. The Leucade, probable cause, costs and damages, noticed in text.

Page 249. The Hopewell; salvage tender, sufficiently noted in text.

Page 253. The Lady Worsley, cargo derelict at Africa; salvage claim forfeited by misconduct, in retaining from owner's agent possession of salvaged property.

Page 256. The Wear Packet, court will not entertain the salvage claim of parties, who have been convicted for misconduct in the same transaction for which they claim the salvage reward.

Page 258. The Royal Stuart. The agent of a ship advanced money on a bottomry bond. The bond was admitted, and on reference of the accounts, it appeared that one large item was on account of relading damaged flour, the property of the agent.

Another large item for money advanced to the master, without inquiry as to the necessity of such advance, or seeing to the application of the money.

The report of the registrar disallowing these items was objected to, but the report was confirmed. *Vide* also, 1 Jur. (N. S.) 1116.

Page 261. The Carl, a prize case, in which it was held, that a ship of war was entitled to share in all captures made by a tender, however distant it may have been.

APPENDIX I, pages 180 and 529.

SHIPPED in good order and condition by on board
the good called the whereof is Master,
Marks and Numbers. for this present voyage, now lying in the Port of
BOSTON, and bound for
To Say :

being marked and numbered as in the margin, and are to be delivered in like good order and condition at the aforesaid Port of _____ (the danger of the seas only excepted), unto or Assigns, he or they paying Freight for the said Goods _____ with _____ Primage and Average accustomed. IN WITNESS WHEREOF, the Master or Agent of the said vessel hath affirmed to Bills of Lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated at BOSTON,

APPENDIX J.

RULES OF PRACTICE OF THE COURTS OF THE UNITED STATES IN CAUSES OF ADMIRALTY AND MARITIME JURISDICTION ON THE INSTANCE SIDE OF THE COURT, IN PURSUANCE OF THE ACT OF CONGRESS OF AUGUST 23, 1842, CH. 188.

RULE I. No *mesne process* shall issue from the District Court in any civil cause of Admiralty and maritime jurisdiction, until the libel or libel of information shall be filed in the clerk's office, from which such process is to issue. All process shall be served by the marshal or by his deputy, or where he or they are interested, by some discreet and disinterested person appointed by the court.

RULE II. In suits *in personam*, the *mesne process* may be by a simple warrant of arrest of the person of the defendant in the nature of a *capias*, or by a warrant of arrest of the person of the defendant with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or, by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for, to elect.

RULE III. In all suits *in personam*, where a simple warrant of arrest issues and is executed, the marshal may take bail with sufficient sureties from the party arrested by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein, in the court, to which the process is returnable, or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal, by the appellate court.

RULE IV. In all suits *in personam*, where goods and chattels, or credits and effects, are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation with sufficient sureties to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such

bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal, by the appellate court.

RULE V. Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits and bail, and depositions in cases pending before the court.

RULE VI. In all suits *in personam*, where bail is taken, the court may, upon motion for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor: and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court to be given, upon motion and due proof thereof.

RULE VII. In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof.

RULE VIII. In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if upon the hearing the same is required by law and justice.

RULE IX. In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other things to be arrested, and the marshal shall thereupon arrest and take the ship, goods, or other things into his possession for safe custody; and shall cause public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order, and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

RULE X. In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay

or injury, by being detained in custody, pending the suit, the court may, upon the application of either party, in its discretion, order the same, or so much thereof, to be sold, as shall be perishable or liable to depreciation, decay, or injury, and the proceeds, or so much thereof as shall be a full security to satisfy the decree, to be brought into court, to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with the sureties in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

RULE XI. In like manner, where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties as aforesaid; and if the claimant shall decline any such application, then the court may in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most for the benefit of all concerned.

RULE XII. In all suits by material-men for supplies or repairs, or other necessities for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material-men for supplies, repairs, or other necessities.

RULE XIII. In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*.

RULE XIV. In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, *in personam*.

RULE XV. In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*.

RULE XVI. In all suits for an assault or beating on the high seas or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

RULE XVII. In all suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, of the master for moneys taken up in a foreign port for supplies or repairs, or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*.

RULE XVIII. In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property in whosoever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter case the suit may be *in personam* against the wrong-doer.

RULE XIX. In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

RULE XX. In all petitory or possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof against the master of a ship, for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

RULE XXI. In all cases where a decree is for the payment of money, the libellant may have a writ of execution, in the nature of a *fiери facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands, rents, or other like estate of the defendant or stipulator.

RULE XXII. All informations and libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on land

or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States ; and the district within which the property is brought, and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.

RULE XXIII. All libels in instance causes, civil or maritime, shall state the nature of the cause, as, for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be ; and if the libel be *in rem*, that the property is within the district ; and if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of facts, upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article ; and it shall conclude with a prayer of the process to enforce his rights *in rem*, or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

RULE XXIV. In all information and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time on motion, to the court as of course. And new counts may be filed and amendments in matters of substance may be made, upon motion at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

RULE XXV. In all cases of libels *in personam*, the court may in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stip-

ulation with sureties in such sum as the court shall direct, to pay all costs and expenses, which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process of the suit.

RULE XXVI. In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and *bonâ fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court.

RULE XXVII. In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel; and shall also answer in like manner each interrogatory propounded at the close of the libel.

RULE XXVIII. The libellant may except to the sufficiency or fullness or distinctness or relevancy of the answer to the article and interrogatories in the libel; and if the court shall adjudge the same exceptions or any of them to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

RULE XXIX. If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain. But the court may in its discretion set aside the default, and upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his

payment of all the costs of the suit up to the time of granting leave therefor.

RULE XXX. In all cases where the defendant answers, but does not answer fully and explicitly and distinctly, to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant, to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

RULE XXXI. The defendant may object by his answer to answer any allegation or interrogatory contained in the libel, which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penalty offense.

RULE XXXII. The defendant shall have a right to require the personal answer of the libellant, upon oath or solemn affirmation, to any interrogatories which he may at the close of his answer propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture, as is provided in the 31st Rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court in its discretion shall deem most fit to promote public justice.

RULE XXXIII. Where either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

RULE XXXIV. If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem*, for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the suit may be required by order of the

court to make due answer, and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

RULE XXXV. Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court, who is a standing commissioner of the court, and is now by law authorized to take affidavits and bail, and also depositions in civil causes pending in the courts of the United States.

RULE XXXVI. Exceptions may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal, and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

RULE XXXVII. In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits, or effects, the same shall be held in his hands liable to answer the exigency of the suit.

RULE XXXVIII. In cases of mariner's wages, or bottomry, or salvage, or other proceedings *in rem*, where freight, or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause, why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto.

RULE XXXIX. If in any admiralty suit, the libellant shall not

appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

RULE XL. The court may in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which on account of his contumacy and default the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

RULE XLI. All sales of property under any decree in Admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

RULE XLII. All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by a check or checks signed by a judge of the court, and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book containing a memorandum and copy of all the checks so drawn and the date thereof.

RULE XLIII. Any person having an interest in any proceeds in the registry of the court, shall have a right by petition and summary proceedings to intervene *per interesse suo*, for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice; and if such petition or claim shall be deserted, or upon a hearing be dismissed, the court may in its discretion award costs against the petitioner in favor of the adverse party.

RULE XLIV. In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or

exercised by masters in chancery in reference to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

RULE XLV. All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit.

RULE XLVI. In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of said courts respectively, in such manner as they shall deem most expedient for the administration of justice in suits in admiralty.

RULE XLVII. These rules shall be in force in all the circuit and district courts of the United States from and after the first day of September next.

It is ordered by the court, that the foregoing rules be and they are adopted and promulgated as rules for the regulation and government of the practice of the circuit courts and district courts of the United States in suits in admiralty on the instance side of the courts; and that the reporter of the court do cause the same to be published in the next volume of his reports; and that he do cause such additional copies thereof to be published, as he may deem expedient for the due information of the bar and bench in the respective districts and circuits.

APPENDIX K, pages 451 and 463.

[PUBLIC — No. 149.]

AN ACT to regulate prize proceedings and the distribution of prize money, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the commanding officer of any vessel or vessels making a capture to secure the documents of the ship and cargo, including the log-book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found and in the condition in which they were found, or explaining the absence of any documents or papers or any change in their condition. He shall send to said court, as witnesses, the master, one or more of the other

officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in or to have knowledge respecting the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize-master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient in view of the interests of probable claimants, as well as of the captors. If the captured vessel or any part of the captured property is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to said court, and subject to its order in the cause.

SEC. 2. *And be it further enacted*, That if any vessel of the United States shall claim to share in the prize, either as having made the capture, or as having been within signal distance of the vessel or vessels making the capture, the commanding officer of such vessel shall make out a written statement of his claim, with the grounds on which it is rested, the principal facts tending to show what vessels made the capture, and what vessels were within signal distance of those making the capture, with reasonable particularity as to times, distances, localities, and signals made, seen, or answered; and such statement of claim shall be signed by him and sent to the court in which proceedings shall be had, and shall be filed in the cause.

SEC. 3. *And be it further enacted*, That it shall be the duty of the prize-master to make his way diligently to the selected port, and there immediately deliver to a prize commissioner the documents and papers and the inventory thereof, and make affidavit that they are the same and in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney, and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons

sent as witnesses to the custody of the marshal, and shall retain the prize in his custody until it shall be taken therefrom by process from the prize court.

SEC. 4. *And be it further enacted*, That the attorney of the United States for the district shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court directing the marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof, and to that end shall see that the proper preparatory evidence is taken by the prize commissioners, and that the prize commissioners also take the depositions *de bene esse* of the prize crew and other transient persons cognizant of any facts bearing on condemnation or distribution. It shall also be the duty of the district attorney to represent the interests of the United States in all prize causes, and he shall not act as separate counsel for the captors on any private retainer or compensation from them, unless in a question between the claimants and the captors on a demand for damages. The district attorney shall examine all fees, costs, and expenses, sought to be charged on the prize fund, and protect the interests of the captors and of the United States. The district attorneys of all districts in which any prize causes are or may be pending shall, as often as once in three months, send to the Secretary of the Navy a statement of the condition of all prize causes pending in their districts, in such form and embracing such particulars as the Secretary of the Navy shall require.

SEC. 5. *And be it further enacted*, That any district court may appoint prize commissioners, not exceeding three in number, of whom one shall be a retired naval officer, approved by the Secretary of the Navy, who shall receive no other compensation than his pay in the navy, and who shall protect the interests of the captors and of the Department of the Navy in the prize property, and at least one of the others shall be a member of the bar of the court, of not less than three years' standing, and acquainted with the taking of depositions.

SEC. 6. *And be it further enacted*, That the prize commissioners, or one of them, shall receive from the prize-master the documents and papers and inventory thereof, and shall take the affidavit of the prize-master hereinbefore required, and shall forthwith take the testimony of the witnesses sent in, separate from each other, on interrogatories prescribed by the court, in the manner usual in prize courts; and the witnesses shall not be permitted to see the interrogatories, documents, or papers, or to consult with counsel or with any persons interested,

without special authority from the court; and the witnesses who have the rights of neutrals shall be discharged as soon as practicable. The prize commissioners shall also take depositions *de bene esse* of the prize crew and others, at the request of the district attorney, on interrogatories prescribed by the court. They shall also, as soon as any prize property comes within the district for adjudication, examine the same, and make an inventory thereof, founded on an actual examination, and report to the court whether any part of it is in a condition requiring immediate sale for the interests of all parties, and notify the district attorney thereof; and if it be necessary to the examination or making of the inventory that the cargo be unladen, they shall apply to the court for an order to the marshal to unlade the same, and shall, from time to time, report to the court anything relating to the condition of the property or its custody or disposal which may require any action by the court, but the custody of the property shall be only in the marshal. They shall also seasonably return into court, sealed and secured from inspection, the documents and papers which shall come to their hands, duly scheduled and numbered, and the other preparatory evidence, and the evidence taken *de bene esse*, and their own inventory of the prize property; and if the captured vessel or any of its cargo or stores are such that, in their judgment, may be useful to the government in war, they shall report the same to the Secretary of the Navy.

SEC. 7. *And be it further enacted*, That the marshal shall safely keep all prize property under warrant from the court, and shall report to the court any cargo or other property that he thinks requires to be unladen and stored, or to be sold. He shall insure prize property if, in his judgment, it is for the interest of all concerned. He shall keep in his custody all persons found on board a prize and sent in as witnesses, until they are released by the prize commissioners or the court. If a sale of property is ordered, he shall sell the same in the manner required by the court, and collect the purchase money, and forthwith deposit the gross proceeds of the sales with the assistant treasurer of the United States nearest the place of sale, subject to the order of the court in the particular cause; and each marshal shall forward to the Secretary of the Navy, whenever and as often as he may require it, a full statement of the condition of each prize and of the disposition made thereof.

SEC. 8. *And be it further enacted*, That whenever any prize property shall be condemned, or shall at any stage of the proceedings be

found by the court to be perishing, perishable, or liable to deteriorate or depreciate, or whenever the cost of keeping the same shall be disproportionate to its value, it shall be the duty of the court to order a sale thereof; and whenever, after the return day on the libel, all the parties in interest who have appeared in the cause shall agree thereto, the court is authorized to make such order, and no appeal shall operate to prevent the making or execution of such order. The Secretary of the Navy shall employ an auctioneer or auctioneers of known skill in the branch of business to which any sale pertains, to make the sale, but the sale shall be conducted under the supervision of the marshal, and the collecting and depositing of the gross proceeds shall be by the auctioneer or his agent. Before any sale the marshal shall cause full catalogues and schedules to be prepared and circulated, and a copy of each shall be returned by the marshal to the court in each cause. The marshal shall cause all sales to be advertised fully and conspicuously in newspapers ordered by the court, and by posters, and he shall, at least five days before the sale, serve notice thereof upon the naval prize commission, and the goods shall be open to inspection at least three days before the sale.

SEC. 9. *And be it further enacted*, That in case a decree of condemnation shall be rendered, the court shall consider the claims of all vessels to participate in the proceeds, and, for that purpose, shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share, and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul or commercial agent of the United States, or notary public, or any officer of the navy highest in rank, reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. And said decree shall recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors, or one half to the captors, and one half to the United States.

SEC. 10. *And be it further enacted*, That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed

to the captors ; and when of inferior force, one half shall be decreed to the United States and the other half to the captors : *Provided*, That, in case of privateers and letters of marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels. All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, shall share in the prize ; and in case of vessels not of the navy, none shall be entitled to share except the vessel or vessels making the capture, in which term shall be included vessels present at the capture and rendering actual assistance in the capture. All prize money adjudged to the captors shall be distributed in the following proportions, namely :—

First. To the commanding officer of a fleet or squadron, one twentieth part of all prize money awarded to any vessel or vessels under his immediate command.

Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander-in-chief of such fleet or squadron, a sum equal to one fiftieth part of any prize money awarded to a vessel of such division for a capture made while under his command, the said fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors : *Provided*, That such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

Third. To the fleet captain, one hundredth part of all prize money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture ; and in such case he shall share, in proportion to his pay, with the officers and men on board such vessel, as is hereinafter provided.

Fourth. To the commander of a single ship, one tenth part of all the prize money awarded to the ship under his command, if such ship at the time of the capture was under the command of the commanding officer of a fleet or squadron, or a division, and three twentieths if his ship was acting independently of such superior officer.

Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board (including the fleet captain), and borne upon the books of the ship, in proportion to their respective rates of pay in the service.

No commanding officer of a fleet or squadron shall be entitled to receive any share of prizes captured by any vessel or vessels not under his command, nor of such prizes as may have been captured by any ships or vessels intended to be placed under his command, before they have acted under his orders. Nor shall the commanding officer of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his said command, nor after he has transferred his command to his successor. No officer or other person who shall have been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, shall be deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled. And he shall continue to share in the captures of the vessels to which he is attached until regularly discharged therefrom.

SEC. 11. *And be it further enacted*, That a bounty shall be paid by the United States for each person on board any ship or vessel-of-war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars if the enemy's vessel was of inferior force, and of two hundred dollars if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel-of-war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture. All ransom money, salvage, bounty, or proceeds of condemned property, accruing or awarded to any vessel of the navy, shall be distributed and paid to the officers and men entitled thereto in the same manner as prize money, under the direction of the Secretary of the Navy.

SEC. 12. *And be it further enacted*, That every assignment of prize or bounty money, or wages, due to persons enlisted in the naval service, and all powers of attorney or other authority to draw, receipt

for, or transfer the same, shall be void unless the same be attested by the captain, or other commanding officer, and the paymaster ; and in case of any assignment of wages, the same shall specify the precise time when they commence. But the commanding officer of every vessel is required to discourage his crew from selling any part of their prize money or wages, and never to attest any power of attorney until he is satisfied that the same is not granted in consideration of money given for the purchase of prize money or wages.

SEC. 13. *And be it further enacted*, That appeals from the district courts of the United States in prize causes shall be directly to the Supreme Court, and shall be made within thirty days of the rendering of the decree appealed from, unless the court shall previously have extended the time for cause shown in the particular case, and the Supreme Court shall always be open for the entry of such appeals. Such appeals may be claimed whenever the amount in controversy exceeds two thousand dollars, and, in other cases, on the certificate of the district judge that the adjudication involves a question of general importance. Notwithstanding such appeal, the district court may make and execute all necessary orders for the custody and disposal of the prize property ; and in case of appeal from a decree of condemnation, may still proceed to make a decree of distribution so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein. Any prize cause now pending in any circuit court shall, on the application of all parties in interest who have appeared in the cause, be transferred by that court to the Supreme Court ; and such transfer may be made, in the discretion of the court, and on such terms as it may direct, on the application of any party ; *Provided*, That if the amount in controversy does not exceed two thousand dollars, such transfer shall not be made unless the court shall certify that the adjudication involves a question of general importance. All appeals to the Supreme Court from the circuit court in prize causes, now remaining therein, shall be claimed and allowed in the same manner as in cases of appeal from the district court to the Supreme Court. In any case of appeal or transfer the court below, or the appellate court, may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof.

SEC. 14. *And be it further enacted*, That all costs and all expenses incident to the bringing in, custody, preservation, insurance, sale, or other disposal of prize property, when allowed by the court, shall be

a charge upon the same and be paid therefrom, unless the court shall decree restitution free from such charge. No payments shall be made from any prize fund, except upon the order of the court. All charges for work and labor, materials furnished, or money paid, shall be supported by affidavit or vouchers. The court may, at any time, order the payment, from the deposit made with the assistant treasurer in the cause, of any costs or charges accrued and allowed. When the cause is finally disposed of, the court shall make its order or orders on the assistant treasurer to pay the costs and charges allowed and unpaid; and in case the final decree shall be for restitution, or in case there shall be no money subject to the order of the court in the cause, any costs or charges allowed by the court, and not paid by the claimants, shall be a charge upon and be paid out of the fund for defraying the expenses of suits in which the United States is a party or interested.

SEC. 15. *And be it further enacted*, That the court may require any party, at any stage of the cause, and on claiming an appeal, to give security for costs.

SEC. 16. *And be it further enacted*, That the net amount decreed for distribution to the United States or to vessels of the navy shall be ordered by the court to be paid into the treasury of the United States, to be distributed according to the decree of the court. And the Treasury Department shall credit the Navy Department with each amount received to be distributed to vessels of the navy; and the persons entitled to share therein shall be severally credited in their accounts with the Navy Department with the amounts to which they are respectively entitled. In case of vessels not of the navy, the distribution shall be made by the court to the several parties entitled thereto, and the amounts decreed to them shall be divided between the owners and the ship's company, according to any written agreement between them, and in the absence of such agreement, one half to the owners and one half to the ship's company, according to their respective rates of pay on board; and the court may appoint a commissioner to make such distribution, subject to the control of the court, who shall make due return of his doings, with proof of actual payments by him, and who shall receive no other compensation, directly or indirectly, than such as shall be allowed him by the court: *Provided*, That in case of vessels not of the navy, but controlled by any department of the government, the whole amount decreed to the captors shall be divided among the ship's company.

SEC. 17. *And be it further enacted*, That the clerk of each district court shall render to the Secretary of the Treasury and the Secretary of the Navy a semi-annual statement, beginning with the first day of July next, of all the sums allowed by the court and ordered to be paid within the previous half year, to the district attorney and prize commissioners for services, and to marshals for fees and commissions; and he shall, in all prize causes in the district, for the purpose of the final decree of distribution, ascertain and keep an account of the amount deposited with the assistant treasurer, subject to the order of the court, in each prize cause, and the amounts ordered to be paid therefrom as costs and charges, and the residue for distribution; and shall send copies of all final decrees of distribution to the Secretary of the Treasury and the Secretary of the Navy; and shall draw the orders of the court for the payment of all costs and allowances, and for the distribution of the residue. And for the said services he shall be entitled to receive the sum of twenty-five dollars in each prize cause, which shall be in full for the services required by this section.

SEC. 18. *And be it further enacted*, That the marshal shall be allowed his actual and necessary expenses for the custody, care, preservation, insurance, sale, or other disposal of the prize property, and for executing any order of the court respecting the same, and shall have a commission of one quarter of [one] per centum on vessels, and of one half of one per centum on all other prize property, calculated on the gross proceeds of each sale; and if after he shall have had any prize property in his custody, and shall have actually performed labor and incurred responsibility for the care and preservation thereof, the same shall be taken by the United States for its own use without a sale, or if it shall be delivered on stipulation to the claimants, he shall, in case the same shall be condemned, be entitled to one half the above commissions on the amount deposited by the United States to the order of the courts, or collected upon the stipulation. No charges of the marshal for expenses or disbursements shall be allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated.

SEC. 19. *And be it further enacted*, That neither the marshal nor the clerk shall be permitted to retain for all official services, of every kind, excepting those in prize causes, more than the maximum compensation allowed to be retained by him by the third section of the act of the twenty-sixth of February, eighteen hundred and fifty-three; nor shall the additional compensation which either of said officers shall be permitted to retain for all services, of every kind, in prize

causes, exceed one half the maximum compensation allowed to them, respectively, by the aforesaid act.

SEC. 20. *And be it further enacted*, That the district attorney and prize commissioners, except the naval officer, shall be allowed a just and suitable compensation for their respective services in each prize cause, to be adjusted and determined by the court, and to be paid as costs in the cause.

SEC. 21. *And be it further enacted*, That each district attorney and prize commissioner, except the naval officer, shall render to the Secretary of the Interior an annual account, beginning with the first day of July next, of all sums he shall have received for all services in prize causes within the previous year; and the district attorney shall be allowed to retain therefrom a sum not exceeding three thousand dollars for each year, in addition to the maximum compensation allowed to be retained by him by the third section of the act of the twenty-sixth February, eighteen hundred and fifty-three, or in addition to any salary he may receive in lieu of such maximum compensation; and each such prize commissioner shall be allowed to retain a sum not exceeding three thousand dollars for each year, which shall be in full for all his official services in prize causes; and any excess over those respective amounts shall be paid by the officer receiving the same into the treasury of the United States, and shall be credited to the fund for paying naval pensions.

SEC. 22. *And be it further enacted*, That the auctioneers employed to make sales of prize property shall be entitled to receive commissions by a scale to be established by the Secretary of the Navy, not to exceed, in any case, one half of one per centum on any sum exceeding ten thousand dollars on vessels, nor one per centum on said sum of other prize property, which shall be in full for his expenses as well as their services; and in case no such scale shall be established, they shall be entitled to receive such compensation as the court shall deem just under the circumstances of each case.

SEC. 23. *And be it further enacted*, That in any case of capture heretofore made, or that may hereafter be made, by vessels of the navy, the Secretary of the Navy may employ special counsel for captors, when, in his judgment, the services of such special counsel are needed in the particular case, for the due protection of the interests of the captors and of the navy pension fund; and under the direction of the Secretary of the Navy, such counsel may institute and prosecute such proceedings in the case as may be necessary and proper for

the protection of such interests. The court may allow such compensation as it shall deem just under the circumstances of each case to special counsel for captors, not being the district attorney or any of his assistants, whether appointed by a department of the government or by the captors, for services actually rendered in the cause, to be paid as costs, in whole or in part, either from the entire fund or from the portion awarded to the captors ; but no such allowance shall be made except for services rendered on matters as to which the party the counsel represents has an adverse interest to the United States, or an interest otherwise proper in the opinion of the court to be represented by special counsel, or for services rendered in a contestation between parties claiming to participate in the distribution of the proceeds.

SEC. 24. *And be it further enacted,* That fees of special counsel in prize cases incurred or authorized by any department of the government, or for the defense of captors against demands for damages made by claimants in the district court, not paid by claimants, nor from the prize fund in the particular cause, and audited and allowed by the department incurring or authorizing them, and by the solicitor of the treasury, shall be a charge upon and paid out of the funds appropriated for defraying the expenses of suits in which the United States is a party or interested.

SEC. 25. *And be it further enacted,* That whenever the court shall allow fees to any witness in a prize cause or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same shall be paid by the marshal, and shall be repaid to him from any money deposited to the order of the court in said cause ; and any amount not so repaid, the marshal be allowed as witness fees paid by him in cases in which the United States is a party.

SEC. 26. *And be it further enacted,* That no prize property shall be delivered to the claimants on stipulation, deposit, or other security, except where there has been a decree of restitution, and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property on those proofs, and has given the captors leave to take further proofs, or where the claimant of any property shall satisfy the court that the same has a peculiar and intrinsic value to him, independent of its market value. In any of these cases, the court may deliver the property on stipulation or deposit of its value, if it shall be satisfied that

the rights and interests of the United States and captors, or of other claimants, will not be prejudiced thereby, a satisfactory appraisement being first made, with an opportunity given to the district attorney and naval prize commissioner to be heard as to the appointment of appraisers. And any money deposited in lieu of stipulation, and all money collected on a stipulation, not being costs, shall be deposited with the assistant treasurer in the same manner as proceeds of a sale.

SEC. 27. *And be it further enacted*, That whenever any captured vessel, arms, munitions, or other material, shall be taken for the use of the government before it comes into the custody of a prize court, it shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterwards, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property heretofore taken for or appropriated to the use of the government, or that shall hereafter be so taken or appropriated, the department for whose use it was or shall be taken or appropriated, shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

SEC. 28. *And be it further enacted*, That in case of any capture heretofore made, or that shall hereafter be made, if, by reason of its condition, or because the whole has been appropriated to the use of the United States, no part of the captured property has been or can be sent in for adjudication, or if the captured property be entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate. And in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the government, shall be deposited with the assistant treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings, for adjudication in any district. And if, in any case of capture, no proceedings for adjudication shall be commenced within a reasonable time, any parties claiming the captured property may, in any district court, as a court of prize, move for a monition to show

cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.

SEC. 29. *And be it further enacted*, That when any vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture, by any competent authority, the court shall award a meet and competent sum as salvage, according to the circumstances of each case ; and if the captured property belonged to the United States, it shall be restored to the United States, and there shall be paid from the Treasury of the United States the salvage, costs, and expenses ordered by the court ; and if the recaptured property belonged to persons residing within or under the protection of the United States, the court shall adjudge the property to be restored to its owners upon their claim, on the payment of such sum as the court may award as salvage, costs, and expenses ; and if the recaptured property belonged to any person permanently resident within the territory and under the protection of any foreign prince, government, or state in amity with the United States, and by the law or usage of such prince, government, or state, the property of a citizen of the United States would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner upon his claim, upon such terms as by the law or usage of such prince, government, or state would be required of a citizen of the United States under like circumstances of recapture ; and when no such law or usage shall be known, it shall be adjudged to be restored upon the payment of such salvage, costs, and expenses as the court shall order : *Provided*, That nothing in this act shall be construed to contravene any treaty of the United States. And the whole amount awarded as salvage shall be decreed to the captors, and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize.

SEC. 30. *And be it further enacted*, That if it shall appear to the court, in the case of any prize property ordered to be sold, that it will be for the interest of all parties to have it sold in another district, the court may direct the marshal to transfer the same to the district selected by the court for the sale, and to insure the same with proper

orders as to the time and manner of selling the same. And it shall be the duty of the marshal so to transfer the property, and keep and sell the same in like manner as if the property were in his own district; and he shall deposit the gross proceeds of the sale with the assistant treasurer nearest to the place of sale, subject to the order of the court in which the adjudication thereon is pending; and the necessary expense attending the insuring, transferring, receiving, keeping, and selling the said property shall be a charge thereupon and upon the proceeds thereof; and whenever any such expense is paid in advance by the marshal, and he shall not be repaid from the proceeds, any amount not so repaid he shall be allowed as in case of expenses incurred in suits in which the United States is a party. The Secretary of the Navy may, in like manner, either by a general regulation or special direction in any cause, require a marshal to transfer any prize property from the district in which the judicial proceedings are pending to any other district for sale, and the same proceedings shall be had as if such transfer had been made by order of the court, as hereinbefore provided.

SEC. 31. *And be it further enacted*, That if any person shall willfully do any act, or aid, assist, or advise in the doing of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States, or any captor or claimant of such property, he shall, on conviction, be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both, at the discretion of the court.

SEC. 32. *And be it further enacted*, That in the term "vessels of the navy" shall be included, for the purposes of this act, all armed vessels officered and manned by the United States, and under the control of the Department of the Navy.

SEC. 33. *And be it further enacted*, That the provisions of this act shall be applied to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.

SEC. 34. *And be it further enacted*, That this act shall apply to all prize proceedings now pending.

SEC. 35. *And be it further enacted*, That the act entitled "An act providing for salvage in cases of recapture," approved on the third

day of March, in the year eighteen hundred, and the act entitled "An act in addition to the act concerning letters of marque, prizes, and prize goods," approved on the twenty-seventh day of January, in the year eighteen hundred and thirteen, and the act entitled "An act in addition to an act entitled an act in relation to the navy pension fund," approved on the sixteenth day of April, eighteen hundred and sixteen, and an act entitled "An act to facilitate judicial proceedings in adjudications upon captured property and for the better administration of the law of prize," approved on the twenty-fifth day of March, eighteen hundred and sixty-two, and the second, sixth, and twelfth sections of an act entitled "An act for the better government of the navy of the United States," approved on the seventeenth day of July, eighteen hundred and sixty-two, and the act entitled "An act further to regulate proceedings in prize cases and to amend various acts of Congress in relation thereto," approved on the third day of March, eighteen hundred and sixty-three, and all other acts and parts of acts inconsistent herewith, are hereby repealed.

Approved June 3, 1864.

APPENDIX L, page 448.

PRIZE INTERROGATORIES.

Interrogatory 1. What is your name, where were you born, and where have you lived for the last seven years? Where do you now live, and how long have you lived in that place? To what prince or state or to whom are you or have you ever been a subject? Are you a married man, and, if married, where do your wife and family reside?

2. Were you present at the time of taking and seizing the ship, or her lading, or any of the goods or merchandises concerning which you are now examined? Had the ship concerning which you are now examined any commission, what, and from whom?

3. In what place, latitude, or port, and when was the said ship and goods, concerning which you are now examined, taken and seized? Upon what pretense, and for what reasons were they seized? Into what port were they carried, and under what colors did the said ship sail? What other colors had you on board, and for what reason had you such other colors? Was any resistance made at the time when the said ship was taken? and if yea, how many guns were fired? and by whom? and by what ship or ships were you taken? Was the ship

or vessel by which you were captured a ship-of-war, or a vessel acting without any commission, as you believe? Were any other and what ships in sight at the time of the capture?

4. What is the name of the master or commander of the ship or vessel taken? How long have you known the said master, and who appointed him to the command of said vessel? Where did said master take possession of her, at what time, and what was the name of the person who delivered the possession to said master? Where doth he live? Where is the said master's fixed place of abode, and where doth he generally reside? How long has he lived there, where was he born, and of whom is he now a subject? Is he married? If yea, where does his wife and family reside?

5. Of what burthen is the vessel which has been taken? What was the number of her mariners, and of what country were the said seamen or mariners? Did they all come on board at the same port, or at different ports, and who shipped or hired them, and when and where?

6. Had you or any of the officers or mariners belonging to the ship or vessel, concerning which you are now examined, any, and what part, share, or interest in the said vessel, or her lading? If yea, set forth who and what goods or interest you or they have. Did you belong to the said vessel at the time she was seized and taken? In what capacity did you belong to her? How long have you known her? When and where did you first see her, and where was she built?

7. What is the name of the vessel? How long has she been so called? Do you know of any other name or names, and what are they, by which she has heretofore been called? Had she any passport or sea chart on board, and from whom? To what ports and places did she sail during her voyage before she was taken? Where did her last voyage begin, and where was the said voyage to have ended? From what port and at what time, particularly from the last clearing port, did the said ship sail previously to the capture? Set forth all the ports to which she has sailed, and at which she has touched and traded during her whole voyage out and home.

8. What lading did the said vessel carry at the time of her first setting sail on her last voyage, and what sort of lading and goods had she on board at the time she was taken? When was the same put on board? Set forth the different species of lading and the quantity of each sort. [Has any part of the cargo of said vessel been unladen since the commencement of her original voyage? If so, at what ports or places was it unladen? State the articles which were unladen.]

9. Who were the owners of the vessel at the time when she was seized? How do you know that they were owners at the time? Of what nation or country are such owners by birth? Where do they reside, and where do their wives and families reside? How long have they resided there? Where did they reside before, to the best of your knowledge? To whom are they subject? [How long have the present owners been in possession? and of whom did they purchase?]

10. Was any bill of sale made, and by whom, to the aforesaid owners of said vessel; and if any such were made, in what month and year, and where, and in the presence of what witnesses? Was any and what engagement entered into concerning the purchase further than appears on the bill of sale? If yea, was it verbal or in writing? Where did you last see it, and what has become of it?

11. Was the said lading put on board in one port and at one time, or in several ports and at several times, and at what ports by name? Set forth what quantities of each sort of goods were shipped at each port.

12. What are the names of the respective laders, or owners, or consignees of said goods? What countrymen are they? Where do they now live and carry on their business? How long have they resided there? Where did they reside before to the best of your knowledge? and where were the said goods to be delivered, and for whose real account, risk, or benefit? Have any of the said consignees or shippers, any and what interest in the said goods? If yea, whereon do you found your belief that they have such interest? Do you verily believe that at the time of the lading of the cargo, and at the present time, and also if said goods shall be restored and unladen at the destined port, the goods did, do, and will belong to the same persons, and to none others?

13. How many bills of lading were signed for the goods seized on board the said ship? Were any of those bills of lading false or colorable, or were any bills of lading signed which were different in any respect from those which were on board the ship at the time she was taken? What were the contents of such other bills of lading, and what became of them?

14. Are there in [] any bills of lading, invoices, letters, or instruments relative to the ship and goods concerning which you are now examined? If yea, set forth where they are, and in whose possession, and what is the purport thereof and when they were brought or sent to [].

15. Was there any charter-party signed for the voyage in which the ship, concerning which you are now examined, was seized and taken? What became thereof? When, where, and between whom was such charter-party made? What were the contents of it?

16. What papers, bills of lading, letters, or other writings were on board the ship at the time she took her departure from the last clearing port, before her being taken as prize? Were any of them burnt, torn, thrown overboard, or cancelled, [or concealed] or attempted to be concealed, and when and by whom and who was then present?

17. Has the ship, concerning which you are now examined, been at any time, and when, seized as prize, and condemned as such? If yea, set forth into what port she was carried, and by whom, and by what authority, or on what account she was condemned.

18. Have you sustained any loss by the seizing and taking the ship concerning which you are now examined? If yea, in what manner do you compute such, your loss? Have you already received any indemnity, satisfaction, or promise of satisfaction, for any part of the damage which you have sustained, or may sustain, by this capture and detention, and when, and from whom?

19. Is the said ship, or goods, or any and what part insured? If yea, for what voyage is such insurance made, and at what premium, and when and by what persons, and in what country was such insurance made?

20. In case you had arrived at your destined port, would your cargo or any part thereof, on being unladen, have immediately become the property of the consignees, or any other person, and whom? Or was the lader to take the chance of the market for the sale of his goods?

21. Let each witness be interrogated of the growth, produce, and manufacture of what country and place was the lading of the ship or vessel, concerning which you are now examined, or any part thereof?

22. Whether all the said cargo, or any, and what part thereof was taken from the shore or quay, or removed or transhipped from one boat, barque, vessel, or ship to another? and from what, and to what shore, quay, boat, barque, vessel, or ship, and when and where was the same so done?

23. Are there in any other country, and where, or on board any and what ship or ships, vessel or vessels, other than the ship or vessel concerning which you are now examined, any bills of lading, invoices, letters, instruments, papers, or documents, relative to the said ship, or vessel and cargo? and of what nature are such bills of lading, invoices, letters, instruments, papers, or documents, and what

are their contents? [In whose possession are they, and do they differ from any of the papers on board, and in what particular do they differ?]

24. Were any of the papers delivered out of the said ship or vessel, and carried away in any manner whatever? and when, and by whom, and to whom? and in whose custody, possession, or power, do you believe the same now are?

25. Was bulk broken during the voyage in which you were taken, or since the capture, of the said ship? and when, and where, by whom, and by whose orders, and for what purpose, and in what manner?

26. Were any passengers on board the aforesaid ship? Were any of them secreted at the time of the capture? Who were the passengers by name? of what nation, rank, profession, or occupation? Had they any commission? for what purpose and from whom? and from what place were they taken on board and when? To what place were they finally destined, and upon what business? Had any, and which of the passengers any, and what property, or concern, or authority directly or indirectly regarding the ship and cargo? Were there any officers, soldiers, or mariners secreted on board, and for what reason were they secreted? Were any of the [

] on board, or secreted, or confined at the time of the capture? How long, and why?

27. Were, and are, all the passports, sea briefs, charter-parties, bills of sale, invoices, and papers, which were found on board, entirely true and fair? or are any of them false or colorable? Do you know of any matter or circumstances to affect their credit? By whom were the passports or sea briefs obtained, and from whom? Were they obtained for this ship only? and upon the oath, or affirmation of the persons therein described, or were they delivered to, or on behalf of the person or persons who appear to have been sworn, or to have affirmed thereto, without their having ever, in fact, made any such oath or affirmation? How long time were they to last? Was any duty or fee payable and paid for the same? and is there any duty or fee to be paid on the renewal thereof? Have such passports been renewed, and how often? and has the duty or fee been paid for such renewal? Was the ship in a port in the country where the passports and sea briefs were granted? and if not, where was the ship at the time? Had any person on board any let-pass, or letters of safe-conduct? If yea, from whom and for what business? Had the said ship any license or passport from any foreign power or authority

during the voyage? If so, state from whom obtained, and for what purpose and use.

28. Have you written or signed any letters or papers concerning the ship and her cargo, other than those found on board and delivered to the captors? If yea, what was their purport, to whom were they written or sent, and what is become of them?

29. Towards what port or place was the ship steering her course, at the time of her being first pursued and taken? Was her course altered upon the appearance of the vessel by which she was taken? Was her course at all times, when the weather would permit, directed to the place or port for which she appears to have been destined by the ship's papers? Was the ship before, or at the time of her capture sailing beyond, or wide of the said place or port to which she was so destined by the ship's papers? At what distance was she therefrom? Was her course altered at any, and what time, and to what other port or place, and for what reason?

30. By whom, and to whom, hath the ship been sold or transferred and how often? At what time and at what place, and for what sum and consideration, hath such sum or consideration been paid or satisfied? Was the sum paid, or to be paid, a fair and true equivalent? or what security or securities have been given for the payment of the same, and by whom, and where do they live now? Do you know or believe in your conscience such sale or transfer has been truly made, and not for the purposes of covering or concealing the real property? Do you verily believe that if the ship should be restored she will belong to the persons now asserted to be the owners and to none others?

31. What guns were mounted on board the ship, and what arms and ammunition were belonging to her? Why was she so armed? Were there on board any other, and what arms and ammunition, and when and where were they put on board? and by whom, or by what authority, or for what purpose or destination, and on whose account were they put on board?

32. What is the whole which you know or believe, according to the best of your knowledge and belief, regarding the real and true property and destination of the ship and cargo, concerning which you are now examined, at the time of the capture?

(There are two additional Interrogatories which were framed and adopted in England, subsequent to the decision of Sir William Scott against the convoyed Swedish fleet, and some other decisions or

dicta respecting Blockade, notice and knowledge thereof, which are inserted as Interrogatories 33 and 34. Portions are included in brackets thus, [] to indicate that there are slight variations between the original Interrogatories adopted respectively by Great Britain, and the United States of America.)

33. Did the said vessel, on the voyage in which she was captured (or on) or during any or what former voyage or voyages, sail under the convoy of any ship or ships of war, or other armed vessel or vessels? For what reason or purpose did she sail under such convoy? Of what force was or were such convoying ship or ships, and to what state or country did the same belong? What instructions or directions had you or did you receive on each and every of such voyages, when under convoy, respecting your sailing or keeping in company with such armed or convoying ship or ships; and from whom did you receive such instructions or directions? Had you any, and what directions or instructions, and from whom, for resisting or endeavoring to avoid or escape from capture, or for destroying, concealing, or refusing to deliver up your vessel's documents and papers; or any and what other papers, that might be or were put on board your said ship? If yea, interrogate particularly as to the tenor of such instructions, and all particulars relating thereto? Let the witness be asked if he is in possession of such instructions, or copies thereof, and, if yea, let him be directed to leave the same with the examiner, to be annexed to his deposition.

34. Did the said ship, during the voyage in which she was captured, or on, or during any, and what former voyage or voyages, sail to or attempt to enter any port under blockade by the arms or forces of any, and which, of the belligerent powers? If yea, when did you first learn or hear of such port being so blockaded, and were you at any, and what time, and by whom warned not to proceed to, or to attempt to enter such blockaded port? What conversation or other communication passed thereon? and what course did you pursue upon, and after, being so warned off?

NOTE. — Other interrogatories were prepared in Great Britain in 1854, to be used in prize cases during the Russian War: likewise in the United States, during the American Rebellion — *Vide* 2 Sprague, pp. 305 to 325 — consisting in all of 103 questions, 57 general interrogatories, and 46 others: some also in Upton on Prize, p. 295 *et seq.* consisting altogether of 43 interrogatories.

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